

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

21

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,071

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 7 1971

NORTHERN INDIANA BROADCASTERS, INC.,
Appellant

Nathan J. Paulson
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

SOUTH BEND TRIBUNE,
MICHIANA TELECASTING CORPORATION,
Intervenors.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR APPELLANT

STATEMENT OF THE ISSUES

This case has not previously been before this Court.

The parties have not entered into a stipulation of the issues presented in this appeal. In the opinion of the Appellant, the following issues are presented:

1. May some separate and distinct programming needs of a suburban community be presumed from certain facts concerning the characteristics of the community?
2. Does the record contain any evidence of programming needs in Mishawaka which are separate and distinct from the programming needs in South Bend?

STATEMENT OF THE CASE

This is an appeal, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 USC § 402(b), from a Decision of the Federal Communications Commission which denied the application of Northern Indiana Broadcasters, Inc., for a new standard (AM) broadcast station at Mishawaka, Indiana.

Mishawaka, population 33,361, lies east of and contiguous to South Bend, population 132,445. Along with a number of smaller municipalities and unincorporated areas in St. Joseph County, they comprise the South Bend urbanized and standard metropolitan statistical areas, with populations of 218,933 and 238,614, respectively.^{1/} Mishawaka is about 95 miles east and slightly south of Chicago.

Mishawaka is the second largest city in Indiana and one of the largest cities in the United States without its own broadcast station. The publisher of the only daily newspaper in the area, The South Bend Tribune (an intervenor here), owns the most powerful standard (AM) broadcast station in South Bend (WSBT), as well as television and FM stations in the city. A subsidiary of Notre Dame University, Michiana Telecasting Corporation (an intervenor here), owns the only other full-time AM station in South Bend (WNDU), as well as television and FM stations. The only other AM station in the area is a daytime only station in South Bend (WJVA).

^{1/} All population data and urbanized and metropolitan area definitions are from the 1960 United States Census.

During the day, Mishawaka receives strong signals from all three South Bend stations and minimal but primary signals from a station in Fort Wayne ^{2/} and a station in Chicago. At night, Mishawaka receives service only from WSBT, South Bend, and one Chicago station. The other full-time station in South Bend, WNDU, ^{3/} does not provide service to any part of Mishawaka at night.

In recognition of the scarcity of service, particularly at night, Northern Indiana filed an application for a new full-time AM station at Mishawaka on April 4, 1961. The proposed technical facilities were designed to satisfy the Commission's rules and policies for coverage to Mishawaka as well as to the urbanized and metropolitan areas, and to minimize the possibility of interference to existing stations.

The application was designated for hearing late in 1962 upon engineering and multiple ownership issues. ^{4/} The Hearing Examiner resolved all issues favorably for Northern Indiana and proposed to grant the application by an Initial Decision issued on November 29, 1963. (JA 1-10).

Before exceptions to the Initial Decision were considered by the Review Board, the Board, at the request of the Commission's

^{2/} Fort Wayne is approximately 65 miles southeast of Mishawaka.

^{3/} Another Chicago station provides day and night primary service to less than 15% of Mishawaka.

^{4/} Northern Indiana also owns AM stations in Michigan City and Goshen, Indiana.

Broadcast Bureau, ordered a further hearing to consider the effect of certain field strength measurements filed informally with the Commission by the South Bend Tribune and to consider a charge by the licensee of an AM station at Elkhart, some 10 miles east of Mishawaka, that Northern Indiana's proposed station would be a South Bend rather than a Mishawaka station. Once again the Examiner, in a Supplemental Initial Decision released October 21, 1965, resolved all issues in Northern Indiana's favor and, for the second time, proposed a grant of the application. (JA 11-29).

While exceptions to the Supplemental Initial Decision, as well as to the original Initial Decision, were awaiting action by the Review Board, the Commission, on December 29, 1965, issued a Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 Federal Communications Commission Reports, Second Series 190, 6 Pike & Fischer Radio Regulations, Second Series 1901 (sometimes referred to herein as the Suburban Community Policy)^{5/}. Briefly, that policy said that, when a proposal for a new or modified AM station in a suburb of a larger central city (50,000 population or greater) would provide a strong signal over any portion of the central city, a presumption is raised that the proposal is realistically one for the central city and, unless the presumption is rebutted, the proposal must satisfy all technical rules for licensing to the central city. Because Northern Indiana's application was subject to the new policy, the Broadcast

^{5/} For convenience, the Policy Statement is included in the Joint Appendix. (JA 110).

Bureau petitioned the Review Board to order a third hearing, this time on issues relating to the policy. The Review Board, in rejecting Northern Indiana's opposition and granting the petition, said that the evidence already in the record was insufficient to rebut the presumption that the application should be considered as one for South Bend rather than for Mishawaka. For convenience, the new issues relating to the Suburban Community Policy are set forth in Appendix A.

The third hearing in October 1966 and January 1967 was followed by a Second Supplemental Initial Decision, released June 19, 1967, again resolving every issue favorably for Northern Indiana and, for the third time, proposing a grant of the application. (JA 30-51).

The Tribune and Michiana (the intervenors here), as well as the Broadcast Bureau, continued to oppose the grant of Northern Indiana's application by filing exceptions to the latest initial decision. Following oral argument on exceptions to all three initial decisions, a panel of the Review Board, by a split two-to-one Decision, denied the application. (JA 52-96). The majority based its denial upon the failure of Northern Indiana to rebut the presumption under the Suburban Community Policy that the application should be considered as one for South Bend rather than Mishawaka and the failure of the technical proposal to satisfy all technical rules

for licensing as a South Bend station. The majority first concluded, in paragraph 19 of its Decision, that Northern Indiana had failed "to adduce evidence of any specific or separate [programming] needs in Mishawaka" (Emphasis supplied), and then held that, because of the failure "to adduce evidence of any specific or separate needs in Mishawaka", Northern Indiana had failed to sustain its burden of proof under Issues (a)(1) and (a)(3) of the Suburban Community Policy. (JA 61, 75). The majority did not weigh the evidence to determine if it was sufficient to rebut the presumption of the policy.

Board Member Nelson issued a lengthy dissenting statement in which he set forth numerous instances and examples of separate and distinct programming needs in Mishawaka based upon the evidence adduced by Northern Indiana in response to the various issues, including Issue (a)(1) of the Suburban Community Policy. He urged grant of the application.

This appeal followed the Review Board's denial of a petition for reconsideration and rehearing (JA 97-108) and the Commission's denial of an application for review and a petition for rehearing.

ARGUMENT

There are two simple, straight forward, and narrow questions presented by this appeal. The first is whether at least some separate and distinct programming needs of a suburban community may be presumed from certain facts concerning the characteristics of the community. The second is whether the record in this hearing contains any evidence of programming needs in Mishawaka which are separate and distinct from the programming needs in South Bend.

If either question is answered in the affirmative, a remand to the Commission is required.

Two of three members of a panel of the Review Board answered these questions in the negative. The third member, Board Member Nelson, issued a dissent in which he most forcefully disagreed with the majority. (JA 85-96).

Unlike earlier hearings and appeals involving the Suburban Community Policy^{6/}, the question here is not whether the record evidence is sufficient to rebut the presumption of the policy that Northern Indiana's application must be considered as proposing a new station for South Bend rather than one for Mishawaka. The majority did not reach the point of weighing the evidence to determine its sufficiency because, in its opinion, there was no

6/ Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, supra.

evidence under Issue (a)(1) to weigh ^{7/8/}. In his dissent, the third member set forth numerous examples of separate and distinct programming needs in Mishawaka based upon the evidence, including evidence adduced in response to Issue (a)(1).

The questions presented by this appeal do not require the expertise of the Commission to answer.

-
- 7/ In paragraph 19 of the Decision, the majority concluded that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka" and, therefore, had failed to sustain its burden of proof under Issue (a)(1). (JA 61, 75).
- 8/ The issues under the Suburban Community Policy referred to in the Decision and throughout this brief as (a)(1), (a)(2), (a)(3), and (a)(4), were as follows:

(a) To determine whether the proposal of Northern Indiana Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location [Mishawaka] or for another larger community [South Bend] in light of all of the relevant evidence, including but not limited to, the showing with respect to:

(1) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(2) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(3) The extent to which the applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

I. MANY SEPARATE AND DISTINCT PROGRAMMING
NEEDS IN A SUBURBAN COMMUNITY MAY BE
PRESUMED FROM CERTAIN FACTS CONCERNING
THE CHARACTERISTICS OF THE COMMUNITY

Is not the need of a candidate for public office for a forum to air his platform a separate and distinct programming need in his community?

Is not the need to inform school children and their parents that certain schools in their community will be closed because of a severe winter storm a separate and distinct programming need?

Is not an urgent call for blood donors by the hospital in the community a separate and distinct programming need in the community?

Is not the need to publicize the fund raising campaign of a social agency a separate and distinct programming need in the community?

Is not the need to report upon the actions of the city council a separate and distinct programming need in the community?

Is not the need to urge attendance at the Easter Sunrise Services conducted by the federation of churches a separate and distinct programming need in a community?

Is it necessary that these and dozens of other self-evident needs be established only through the testimony of a candidate for public office, the testimony of a school official, the

testimony of the local hospital administrator, the testimony of a member of the city council, or the testimony of a local minister?

Once certain basic facts have been established, such as the existence of local elective offices, a separate school system, a local hospital, a local city council, and the holding of Easter Sunrise Services by the local federation of churches, cannot separate and distinct programming needs for each be presumed?

The majority of the panel has said, in effect, that such presumptions are not permissible and that testimony is necessary to establish such needs. The third member has disagreed, and has set forth in his dissent examples of presumptive needs which actually exist in Mishawaka.^{9/}

The Suburban Community Policy Statement does not state that such separate and distinct programming needs cannot be presumed. Nor does any other decision or pronouncement of either

^{9/} In commenting upon an objection to an exhibit listing civic organizations in Mishawaka, South Bend, and St. Joseph County (Northern Indiana Exhibit No. R-13), the Examiner said, in response to an inquiry as to the purpose of the exhibit:

PRESIDING EXAMINER: The extent to which the applicant's proposal meets unspecified, unsatisfied program needs may very well be relevant to that.

And Sub-issue 1, the extent to which the station location has been ascertained to have separate and distinct program needs.

I think it is the principal that all of these civic organizations at one time or another, have program needs, if the station is willing to furnish it.

(Tr. 819, L9-22)(Emphasis supplied)

the Board or the Commission itself so hold.

The Policy Statement does make it clear, however, that fulfillment of the needs of the suburban community by existing standard (AM) broadcast stations cannot be presumed but must be established by probative evidence in response to Issue (a)(2). The Policy Statement also makes it clear that fulfillment of the specific, unsatisfied programming needs of the suburban community by the proposed station cannot be presumed but must be established affirmatively in response to Issue (a)(3).^{10/}

^{10/}In paragraph 4 of the Policy Statement, the Commission said:

4. ... However, it soon became apparent that the suburban problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions. . .

Then the Commission said:

10. During the course of an evidentiary hearing to determine, inter alia, whether an applicant will realistically serve his specified community or another larger community, that applicant will be required to rebut the presumption that will have arisen because of his proposed coverage. Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from a central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programming needs. The parties will then be permitted to show the extent to which that community's needs are being met by existing standard broadcast stations, and the applicant will be expected to show the extent to which his program proposal will meet the specific, unsatisfied programming needs of his specified community. At the same time, although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared to the sources from all other areas.

That some separate and distinct programming needs of a suburban community may be established, at least in cases where the suburb is of substantial size, by presumptions drawn from data concerning characteristics of the community is apparent from the Review Board's Decision in Jupiter Associates, Inc., 12 FCC 2d 217, 12 RR 2d 889 (March 29, 1968), affirmed Jupiter Associates, Inc., v. FCC, 136 U.S. App. D.C. 266, 420 F2d 108 (1969). At the outset of its findings in Jupiter, the Board said:

5. The demographic and community survey evidence, together with the testimony of Elizabeth's mayor, Thomas G. Dunn, and former mayor, Steven J. Berick, established clearly that Elizabeth is one of the Nation's major cities and that it has programming needs which are separate and distinct from either Newark or New York. These needs are traceable to the size of the city (107,698 persons), its industrialized nature, the different characteristics of the population, and its prominence as the trading center and seat of Union County (504,255 persons). . .

(Emphasis supplied)

In ordering a further hearing on the Suburban Community Policy issues, the Review Board did not state that the evidence already submitted by Northern Indiana could not be used to establish certain presumptive programming needs in Mishawaka separate and distinct from those in South Bend. All that the Board held was that "[t]he evidence in the existing record is not sufficient to resolve the issues being sought by the Broadcast Bureau in accordance with the Commission's criteria set out in the

policy statement." (JA 117).

It is respectfully submitted that the views of dissenting Board Member Nelson concerning presumptive programming needs in Mishawaka which are separate and distinct from those in South Bend are sound and correct.

A remand with instructions that presumptive needs be determined and considered is required.

II. THE RECORD ESTABLISHES THAT THE MAJORITY OF THE PANEL ERRED IN CONCLUDING THAT NORTHERN INDIANA FAILED TO ADDUCE EVIDENCE OF ANY SEPARATE AND DISTINCT NEEDS IN MISHAWAKA

A. An Effort Was Made To Ascertain The Separate and Distinct Programming Needs in Mishawaka

At the outset of its findings under the Suburban Community Policy issues, the majority of the panel, in paragraph 6 of its Decision, expressed criticism of the manner in which Northern Indiana undertook to ascertain the separate and distinct programming needs of Mishawaka. Inasmuch as those critical comments contributed, at least to some extent, to the grossly erroneous conclusion that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka", a review of the manner in which the surveys and studies were made is appropriate.

Even before Northern Indiana filed its application on April 4, 1961, an effort was made to ascertain the separate and distinct programming needs in Mishawaka as well as in other areas which would be served by the proposed station so that a realistic program service could be proposed for Mishawaka. The testimony of Mr. Udell on April 20, 1963, concerning surveys made of programming needs prior to the filing of the application for Mishawaka is quoted on Appendix B

^{11/}
of this brief.

Following the issuance of the Suburban Community Policy Statement on December 29, 1965, and the filing of the Broadcast Bureau's petition for a further hearing upon issues relating to the policy, Northern Indiana undertook preparation for the further

11/ In a footnote to its Decision, the majority of the panel said:

^{7/} Indicative of the fact that the 1961 program survey was not directed to "the separate and distinct programming needs" of Mishawaka is the fact that the third questionnaire (see para. 10, supra) was directed to all St. Joseph County Public high school principals except Mishawaka and South Bend.

But how about the other two questionnaires? In its findings in paragraph 10, the majority failed to state that the businessmen surveyed were all in Mishawaka and that the survey of some 60 respondent club and organizations were all in Mishawaka. In stating that 39 of the club and organization leaders were from Mishawaka, the majority erroneously assumed that the postmark on the return card of the survey indicated the community in which the club or organization was located. The situation is just as though an officer of a club in Silver Spring, Maryland, mailed the return card while in Washington for work or a visit. Mr. Udell's testimony that all questionnaires were mailed to and all returns were received from Mishawaka clubs and organizations was unchallenged. Mr. Udell's unchallenged testimony, which is set forth in Appendix B, shows that 97 of the 117 replies received from all three questionnaires (83%) were from Mishawaka businesses, clubs and organizations. Ordinarily, such errors in a decision would not be commented upon by the appellant. However, they assume crucial significance in view of the critical comments running throughout the majority's decision and particularly in view of the conclusion on those particular matters which were so adverse to Northern Indiana that they led directly to the denial of its application. It is respectfully submitted that a much higher degree of accuracy must be expected when the ultimate conclusion is so adverse, both to an applicant and to the public proposed to be served.

hearing upon the assumption that one would be ordered. Mrs. Norma Davitt, a lifelong resident of South Bend, was employed to conduct a survey of schools, churches, civic organizations, and businessmen in Mishawaka for the purpose of obtaining information concerning their radio programming needs and the use they had made of radio. Pertinent portions of the examination of Mrs. Davitt concerning the information she sought to elicit are quoted in Appendix C of this brief. Some of the results of her work will be discussed later in this brief.

Immediately after the further hearing on the Suburban Community Policy issues had been ordered, Northern Indiana had a study made of news stories appearing in the South Bend Tribune during the week of March 14, 1966, which were considered to be of particular, peculiar, or genuine interest to residents of Mishawaka. (Tr. 1496, L19 - Tr. 1497, L7). The majority of the panel made no reference to that study in its Decision.

In response to the Suburban Community Policy issues, Northern Indiana also introduced into evidence the program schedules of the three South Bend standard (AM) stations for a week in February and a week in September 1966 as published in the South Bend Tribune (Northern Indiana Exhibit Nos. R-4 and R-5). In rebuttal, the two intervenors (the Tribune and Michiana) presented more detailed evidence concerning the program service of their respective AM stations

(WSBT and WNDU) and somewhat less detailed evidence concerning the program service of the daytime only station, WJVA. Additional evidence concerning the separate and distinct programming needs in Mishawaka was developed from the intervenors' evidence. The majority of the panel failed to consider such evidence when it concluded that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka".

B. The Record Contains Extensive
Evidence Of Separate And Distinct
Programming Needs In Mishawaka

The ultimate question presented by this appeal is whether the conclusion of the majority of the panel, that Northern Indiana had failed "to adduce evidence of any specific or unsatisfied needs in Mishawaka", was correct or erroneous. If the record contains any such evidence, a remand to the Commission with instructions to weigh the sufficiency of such evidence is required. This Court should not be expected or requested to make an original determination as to the weight of the evidence.

The discussion which follows is not intended to set forth all of the separate and distinct needs in Mishawaka established by the record. Such a comprehensive discussion, for all practical purposes, would be a new and lengthy set of proposed findings of fact. The discussion will conclusively prove, however, that Northern Indiana did develop many separate and distinct programming needs in

Mishawaka.

Board Member Nelson devoted almost four pages of his dissenting statement to a recital of both presumed and evidentiary needs established by the record. (JA 89-92). Among the needs he described are the "need for a local outlet for candidates for local public office", the "need for Mishawaka businessmen to reach the nighttime audience in Mishawaka", and the "need for an AM station in Mishawaka to present sporting events which are not being offered by the South Bend AM stations". Actually, he did little more than scratch the surface.

Contrary to the majority's comment, in paragraph 11, that Mrs. Davitt's reports of her survey of needs in Mishawaka "are in most cases of the utmost brevity, often involving nothing more than a one or two line reference to existing service to the organizations concerned", substantial and significant information can be elicited from many, but not all, of her reports, particularly when consideration is given to the questions she asked.

Before discussing the results of Mrs. Davitt's survey, it must be noted that the majority apparently proceeded upon the assumption that "separate and distinct programming needs" in the specified community [Mishawaka] cannot exist for an organization which has used in the past or is using at the present the facilities of an existing broadcast station. Such an assumption does

Church; the Kingdom Hall (Jehovah's Witnesses); the East Methodist Church; and the Trinity Gospel Lighthouse. (Northern Indiana Ex. R-15). Has not the separate and distinct programming needs of each of those churches been established by Northern Indiana? Obviously, the answer is "Yes".

But that is not all with respect to Mrs. Davitt's interviews with the ministers! Other reports show additional needs.

Father Miller, of St. Joseph Catholic Church, "would like very much to have the high school activities covered on radio". Reverend Stephen Cvaniga, Pastor of St. Bavo Catholic Church, "does occasionally have items pertaining to the Catholic Youth Group in particular he would like to have broadcast". Reverend Robert Kuhne, Pastor of South Side Church of the Nazarene said, in effect, that "there are occasions when they have Missions and special speakers they would appreciate announcements on the air". Reverend Victor Kauffeld, Pastor of St. Peter Lutheran Church, reported that he "was interested in radio time in the future". Reverend Wayne Yeater, Pastor of the First Methodist Church, "often has items of interest he would like broadcast". (Northern Indiana Ex. R-15).

All told, Mrs. Davitt's surveys developed identified needs for radio of at least 11 Mishawaka Churches. Yet the majority of the panel concluded that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka."

Further, the evidence developed through the exhibits and witnesses of the intervenors both confirmed the accuracy of most of Mrs. Davitt's reports as well as established needs of additional churches in Mishawaka.

On the "Morning Devotions" program broadcast for ten minutes each weekday on the Tribune's WSBT, Mishawaka churches participated as follows over the three year period of 1964, 1965 and 1966:

South Side Church of the Nazarene	1 week
East Methodist Church	3 weeks
First Methodist Church	4 weeks
St. Andrew's United Church of Christ	2 weeks
Immanuel Baptist	1 week
First Presbyterian	2 weeks
First Evangelical United Brethern	<u>1 week</u>

Total	14 weeks
Total Churches	7

(WSBT Ex. R-7, p 3; Ex. R-31; JA 146)

Would those Mishawaka churches have participated in the broadcasts if they did not have separate and distinct programming needs? Were their needs satisfied by such a limited number of programs? Will not their needs continue in the future? Cannot Northern Indiana's proposed station in their hometown assist in fulfilling their needs in the future?

The Tribune's evidence also showed that announcements were broadcast at least once on behalf of the following churches or church organizations on WSBT's "Timely Topics" program during the

56 week period between May 3, 1965 and May 31, 1966:

Mishawaka Brethern Women's Missionary Society
St. Joseph Catholic Church -- Rosary Society
East Methodist Church
Church of God
First Methodist Church
First Church of God
First E.V.B. Church
First Lutheran Church
Council of Church Women
Milburn Church of God
St. Bavo's Catholic Church Home & School Association.

(WSBT Ex. R-6; JA 119-143).

Would those Mishawaka churches and organizations have submitted announcements for broadcast if they had no need?

The record contains similar evidence of somewhat less extensive use of the other two South Bend stations by Mishawaka churches and church organizations.

Although Northern Indiana sincerely believes that it already has more than amply demonstrated the gross error of the majority's conclusion, that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka", a few additional examples of proven needs will be given.

(2) Clubs and Organizations

Mrs. Davitt's reports of her interviews with representatives of various clubs and organizations in Mishawaka disclose the following needs. The American Legion Post 161 Auxiliary has "occasions such as Poppy Day and Veterans' Day when they would like to

broadcast". The Mishawaka Antique Study Club does have announcements it would like to broadcast. The Barber Shop Singers give a benefit show which they "advertise" on radio. The Camp Fire Girls "would appreciate the opportunity to get items on the air". The Mishawaka Council of the Parent-Teacher Association no longer sends in items because "they know they will not be broadcast". (Northern Indiana Ex. R-16). Are not these separate and distinct needs in Mishawaka ascertained by the applicant?

The record also establishes that the Tribune's WSBT broadcast interviews on its "Timely Topics" programs between May 3, 1965 and May 31, 1966, with representatives of the following Mishawaka organizations or on behalf of the following activities: Family and Children's Center; Mishawaka Women's Division, United Fund; United Nation's Day program in Mishawaka; Auxiliary, St. Joseph Hospital Bazaar; and the South Bend Coin Club. In addition, announcements were broadcast during that same period on that program on behalf of the following Mishawaka organizations:

- Mishawaka High School
- Marion High School Boosters Club
- South Side School
- Emmons School PTA
- Emmons School - Family Life Forum
- Beiger School PTA
- Home & School Administration of St. Joseph School
- Family & Children's Center Auxiliary
- Gold Star Mothers of Mishawaka
- Mishawaka Kiwanis Club
- Daughters of Isabella
- Domaco Club of Dodge Manufacturing

Loyal Order of Moose #1263
Tri Kappa Sorority
St. Joseph Hospital Auxiliary
Women of the Moose Chapter #98
Veterans of Foreign Wars Post 360
American Legion Post 161 Auxiliary
Loyal Order of Moose #1262
May Fellowship Luncheon
B-K Club.

(WSBT Ex. R-6; JA 119-143).

Would any of those 21 organizations have requested the broadcast of announcements on their behalf if they had no need for radio service? Can it be presumed that they will have no needs in the future?

Reference has been made earlier in this brief to the survey conducted by Mr. Udell in 1961. As shown above, the majority's rejection of the survey was based upon the erroneous conclusion that no portion of the survey was limited to Mishawaka organizations. Actually, the unchallenged evidence shows the following returns from Mr. Udell's survey of clubs and organizations located in Mishawaka:

Question number one: "Do you ever hear any news items or notices about YOUR club or organization broadcast on any radio station?" Yes, 24; no, 35.

Question number two: "If you knew that a radio station had a regular program which would broadcast free news notes and items about your organization's activities, aims and interests, would it be of benefit to you?" Yes, 59, no, 1.

Question number three: "Do you believe that your organization's aims and work are of sufficient importance to deserve the free use of valuable radio time?" Yes, 58; no, 2.

Question number four: "How many attended the last meeting?" The total for that was 3,090.

(Tr. 240, L25 - Tr. 241, L16).

Did not that survey establish separate and distinct programming needs in Mishawaka?

(3) Summary

Similar, but somewhat less extensive, analyses can be made of established needs of educational, municipal, and manufacturing organizations actually located in and serving Mishawaka. The foregoing discussion has shown that so many "separate and distinct programming needs" exist in Mishawaka that the majority's conclusion that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka" was arbitrary and capricious.

The majority stated as follows at the outset of paragraph 13: "Northern Indiana's failure to adduce evidence of any specific or separate needs in Mishawaka may be the product of its own interpretation of the relevant issue". In his dissenting statement, Board Member Nelson went to some length to demonstrate that it was the majority who misinterpreted the relevant issues. That Mr. Nelson was correct when he concluded that the record established numerous separate and distinct needs to exist in Mishawaka has been convincingly established by the foregoing discussion.

C. The Majority's Findings and Conclusions
Concerning Northern Indiana's Proposed Service
For Mishawaka Are Incomplete and Inaccurate

Northern Indiana does not intend to show at this time that the majority's findings and conclusions concerning the manner in which the program service of the proposed station will meet the specific, unsatisfied programming needs of Mishawaka (Issue (a)(3)) contain numerous omissions and inaccuracies which are most prejudicial. The majority's findings and conclusions concerning the proposed program service are based upon its erroneous conclusion that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka".

This matter is mentioned only so that the Court does not mistakenly assume that Northern Indiana does not disagree with the adverse findings and conclusions of the majority concerning its proposed program service.

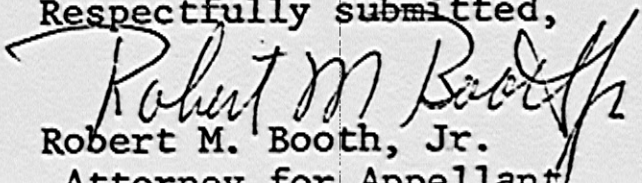
CONCLUSIONS

For the foregoing reasons, it is respectfully requested that the Decision of the Federal Communications Commission which denied the application of Northern Indiana Broadcasters, Inc., for the first broadcast station of Mishawaka, Indiana, be set aside and that the case be remanded to the Commission with instructions that a revised decision be prepared based upon careful consideration of all of the record evidence.

Of Counsel:

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Respectfully submitted,


Robert M. Booth, Jr.
Attorney for Appellant
Northern Indiana Broadcasters, Inc.

January 15, 1971

APPENDIX A

Issues Added Pursuant To
The Suburban Community Policy

(a) To determine whether the proposal of Northern Indiana Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(2) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(3) The extent to which the applicant's program proposal will meet the specific, unsatisfied programing needs of its specified station location; and

(4) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with his projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that the proposal will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b) (1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

(c) To determine, in the event that it is concluded, pursuant to the foregoing issue (a) that Northern Indiana Broadcasters, Inc., will not realistically provide a local transmission service for Mishawaka whether South Bend has any existing standard broadcast nighttime facility, and,

if so, whether the interference which would be received by the applicant would affect more than 10 percent of the population within its normally protected primary service area in contravention of section 73.28(d)(3) of the rules, and, if so, whether circumstances exist which would warrant a waiver of that section of the rules.

APPENDIX B

Testimony of William N. Udell on
April 29, 1963 Concerning 1961 Survey
Of Programing Needs in Mishawaka

A. In order to supplement my own knowledge of the market, their policies, and so forth, and to formulate a basis for in-program interest, I conducted certain studies and certain surveys. May I refer to them?

* * * * *

A. I mailed a total of 53 business-industry survey cards to businesses located in Mishawaka, containing a prepaid-postage card, self-addressed. There was also a letter requesting their cooperation. I received 39 replies, seven letters were returned for wrong address, better address, or out of business.

Question number one: "Do you ever listen to any business or industry news broadcast on any radio station?" Yes, 32; no, 6; seldom, 1.

Question number two: "Industrial and business leaders in other Indiana towns have felt that they had a need to communicate with or tell the people of the area certain things about their business, its activities, progress and problems. Do you ever feel such a need?" Frequently, 9; sometimes, 23; never, 7.

Question number three: "Would you listen to a business/industry news broadcast?" Yes, 33; no, 2; maybe, 4. Two cards contained a notation that it would depend upon the time.

Question number four: "Would you give news items about your firm to radio-station reporters?" Yes, 31; no, 2; sometimes, 2; no answer, 4.

A postcard survey was conducted among the principals of all public schools in St. Joseph County, excluding those located in South Bend and Mishawaka. I might point out that this survey is now somewhat obsolete due to a serious reorganization of smaller schools throughout the entire State of Indiana. Twenty replies were received.

Question number one: "Does any radio station near your school broadcast any news about events or activities at your school?" Yes, 17; no, 2.

Question number two: "Have you any interest in having radio coverage of such events and activities?" Yes, 16; no, 3.

Question number three: "Have you ever been contacted by a reporter from the news department of a radio station?" Yes, 11; no, 8.

Question number four: "Do you ever call any radio station when you have an urgent 'no school today' or 'change of plans' announcements to make?" Yes, 20; no, 0.

A similar postcard survey was conducted among officers of clubs or organizations in Mishawaka. Replies were a total of 58. I checked the postmarks on the cards, which may or may not have any significance. 39 were postmarked Mishawaka; 15, South Bend; 2 Osceola; 1, Cedarville, Michigan; 1, Menominee, Michigan

Question number one: "Do you ever hear any news items or notices about YOUR club or organization broadcast on any radio station?" Yes, 24; no, 35.

Question number two: "If you knew that a radio station had a regular program which would broadcast free news notes and items about your organization's activities, aims and interests, would it be of benefit to you?" Yes, 59; no, 1.

Question number three: "Do you believe that your organization's aims and work are of sufficient importance to deserve the free use of valuable radio time?" Yes, 58; no, 2.

Question number four: "How many attended the last meeting?" The total for that was 3,090.

(Tr. 239,L7 - Tr. 241,L16)

APPENDIX C

Testimony of Mrs. Norma Davitt on
October 19 and 20, 1966, Concerning Survey
Of Programing Needs in Mishawaka

Pertinent portions of the examination of Mrs. Davitt concerning the information sought to be elicited by her survey follow. The information she obtained is set forth elsewhere in this brief.

BY MR. BOOTH [Counsel for Northern Indiana]:

Q. What did Mr. Udell [President of Northern Indiana] ask you to do?

A. I was to do a survey of the Mishawaka businessmen, the various clubs and organizations in Mishawaka, and also to contact the ministers of the various churches within the city.

Q. Did you also check with some of the educational institutions?

A. Yes, sir, some of the civic leaders and high schools and one of the colleges.

Q. Did Mr. Udell ask you to make a survey and, what specific information did he ask you to obtain?

Did he give you any written instructions?

A. Yes, sir, he did, and if you would like me to be more specific, I brought the material from which I took the names and also the little form that I used in my interviews.

Q. Would you please read from your notes the questions Mr. Udell asked you to ask the persons you were interviewing?

A. When I contacted the businessmen I was to find out if they were no advertising on the radio, if they were now advertising in the newspapers, if they considered

the rates high or low or fair, when the radio salesman had last called and when the newspaper representatives had called, if they belonged to any local clubs and organizations, when they had heard these mentioned on the radio - - -

Q. By "these" you mean the clubs and organizations?

A. The clubs and organizations, yes, sir.

If the radio stations had given coverage to these organizations as far as news went. For the local businessmen, if they were receiving radio support in their selling activities.

Another very important question was whether they felt a radio station would be helpful to them individually and whether it would be a help to their city.

When I contacted the ministers it varied a little bit; whether they were having news items that might be of interest to the public, the civic organizations, whether they had news that they might like to have on in the evening.

Also those men were asked if they thought a radio station might be helpful to them.

Q. Were the same questions asked of the educators and other individuals interviewed?

A. Pretty much along the same lines, yes, sir.

(Tr. 809, L16 - Tr. 811, L14)

* * * * *

BY MR. BOOTH:

Q. What specifically did you ask the ministers or the priest or have you already given that in your series of questions?

A. It was not as lengthy an interview. I asked if they had any activities during the year that they would like to have on radio, that their parishioners might be interested in, and whether they were contacted regularly.

Q. Did you also ask what use they had made of radio?

A. Yes, sir.

Q. Did you identify yourself as being with applicant for a new station in Mishawaka?

A. This was always my beginning statement, that I was a representative for the people who were interested in building a station in Mishawaka area.

(Tr. 847,L20 - Tr. 848,L8)

* * * * *

BY MR. BOOTH:

Q. First. . . will you please tell us what you asked the ministers of churches whose names are listed on Exhibit R-15?

A. I identified myself to begin with and explained that I was conducting a survey for the new station to be built, we hoped. I asked when the last time was that they had heard an announcement concerning their church on the radio. I also asked if they had ever been contacted in this respect and I also asked if they had any announcements that they would like to have broadcast.

(Tr. 868,L16 - 25)

* * * * *

BY MR. BOOTH:

Q. Are the remainder of these clubs and organizations [listed in Northern Indiana Exhibit R-16] located within the corporate limits of Mishawaka to the best of your knowledge?

A. Yes, sir, they are.

Q. How did you go about contacting representatives of clubs and organizations in Mishawaka?

A. This was done by telephone also.

Q. What did you use as your source of information as to the organizations to be contacted?

A. This was the booklet published by the "Enterprise" which listed clubs and organizations, not only for Mishawaka but for other areas also.

Q. Now, what did you tell the people when you called them and what did you ask them?

A. One of the questions was whether they had - - -

Q. First of all what did you tell them when you, called up?

A. That I was representing the people who were planning a new radio station to be built in Mishawaka and that I was conducting this survey and would like to ask them a very few questions. I asked whether they had ever heard their club or organization mentioned on radio, when was the last time that they had heard it mentioned, if they ever had news items of particular interest to their group, and if they had been contacted.

(Tr. 875,L1 - Tr. 876,L1)

No. 24,071

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN INDIANA BROADCASTERS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MICHIANA TELECASTING CORPORATION,
SOUTH BEND TRIBUNE,
Intervenors.

On Appeal From a Decision of
The Federal Communications Commission

BRIEF OF INTERVENOR

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 22 1971

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* Cases and other authorities chiefly relied upon are marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN INDIANA BROADCASTERS, INC.,)
Appellant,)
v.)
FEDERAL COMMUNICATIONS COMMISSION,)
Appellee,)
SOUTH BEND TRIBUNE,)
MICHIANA TELECASTING CORPORATION,)
Intervenors.)

Case No. 24,071

ON APPEAL FROM A DECISION
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR

STATEMENT OF ISSUES PRESENTED*

Whether the Commission, in denying the application of Northern Indiana Broadcasters, Inc., for a new standard station at Mishawaka, Indiana, misevaluated and disregarded pertinent record evidence in applying its *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*.

COUNTERSTATEMENT OF THE CASE

This appeal is from (1) a Decision of the Federal Communications Commission released June 26, 1968, 13 FCC 2d 546 (JA 52), denying the application of Northern Indiana Broadcasters, Inc. for a construction permit for a new standard broadcast station at Mishawaka, Indiana (Docket No. 14855, File No. BP-14771); (2) from Memorandum

* This case has not previously been before this Court.

Opinion and Order released November 15, 1968, 15 FCC 2d 264 (JA 97), denying a petition for reconsideration and rehearing of said Decision; and (3) from an Order released February 26, 1970 (FCC 70-86) (SJA 298), denying an application for review.

In order that the Court might better understand the issues considered in this proceeding, the following historical review and explanation is presented.

Historical Background

Appellant, Northern Indiana Broadcasters, Inc. (NIB), is an unsuccessful applicant for authority to construct a new Class III-B standard broadcast station to operate day and night with different directional arrays (DA-2) on 910 kHz with 1 kw at Mishawaka, Indiana. The application was filed on April 4, 1961,¹ and was without competition. The Commission, noting that the applicant has stations in Michigan City (WIMS) and Goshen (WKAM), Indiana, and that the proposed operation threatened interference to WFDF, Flint, Michigan, and WLS, Chicago, by Order (FCC 62-1210) released November 27, 1962, designated the application for hearing on issues concerning coverage, interference, multiple ownership and concentration of control. WFDF and WLS were named parties to the proceeding. On December 2, 1963, an initial decision, 13 FCC 2d 591 (JA 1), was issued recommending grant of the applications.

Exceptions to the Initial Decision were filed by the Broadcast Bureau and by the respondent, WLS, on January 2, 1964. On the same date, The South Bend Tribune, not then a party to the proceeding but the licensee of Radio Stations WSBT in South Bend, filed with the Commission a set of field strength measurements. On January 13, 1964, the Broadcast Bureau filed a motion to reopen the record, saying that WSBT's measurements showed that there would be more primary service within applicant's nighttime interference-free contour than was shown at hearing.

On February 7, 1964, Clarence C. Moore, licensee of Station WCMR, Elkhart, Indiana (a city located some 10 miles from Mishawaka), filed a petition requesting that the issues in this proceeding be enlarged to determine whether the application was filed in whole or in part with the intent that it would be an additional South Bend, Indiana, station. Attached to this pleading was an affidavit of the licensee of the Elkhart station. The

¹ Following Commission denial of an earlier application specifying South Bend because of the inefficiency of that proposal. *Northern Indiana Broadcasters, Inc.*, 24 FCC 63, 69 (1958).

affidavit of the Elkhart licensee covered comments assertedly made by applicant's principal, including one to the effect that his primary interest in locating a station in Mishawaka was to serve South Bend. On February 27, 1964, the Broadcast Bureau filed comments also proposing that the issues be enlarged based upon the questions raised by the Elkhart petition and whether the application was entitled to a 10 percent rule exception.

Without final disposition of the issues first tried, the Review Board, by Memorandum Opinion and Order (FCC 64R-407) released on August 10, 1964, granted the Bureau's request of February 27, 1964, to reopen the record and remanded the proceeding to the Hearing Examiner for further hearing to determine whether the applicant's proposal should be treated as one for Mishawaka (where NIB would have the benefit of an exception to the 10 percent rule) or for South Bend, and, if treated as one for South Bend, whether circumstances are present which would warrant a waiver of the applicant's non-compliance with Section 73.28(d)(3) of the Commission's Rules, the 10 percent rule.²

Based on the new engineering material submitted by WSBT, which the Bureau said, (contrary to findings contained in the Initial Decision), showed that that proposed operation would serve no "white area" and only small "gray area", the Board, on September 24, 1964, by Memorandum Opinion and Order (FCC 64R-407), granted the Bureau's petition to reopen the record of January 13, 1964. Since the proceeding had been reopened for hearing on whether the Commission's 10 percent rule would be violated and, if so, whether there are grounds for waiver, the Board concluded that the existence of a white or gray area could be of critical importance in determining whether non-compliance with the 10 percent rule should be waived. Accordingly, the Board remanded the proceeding "for the purpose of adducing additional engineering data to determine the areas which would receive primary service from the applicant's proposal and the number of other primary services available to such areas."

Radio Station WSBT was granted leave to intervene for the limited purpose of presenting its version of applicant's field strength contours. The Hearing Examiner released a Supplemental Initial Decision, 13 FCC 2d 601 (JA 11), on October 25, 1965, recommending grant of the application. Exceptions accompanied by requests for oral argument were filed by both WSBT and the Broadcast Bureau.

² Section 73.28(d)(3), the Commission's so-called 10 percent rule provides, in substance and in pertinent part here, that even though a proposed station would receive interference affecting more than 10 percent of the population within the area it would serve, were it not for interference, grant may nevertheless issue, if the station would provide a nighttime facility to a community not having such a facility.

Pending the scheduling of oral argument after the release of the Supplemental Initial Decision, the Commission issued its *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities* (Public Notice released December 27, 1965), 2 FCC 2d 190 (JA 110), (*Suburban Community Policy*) applicable in those situations where "the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community." (JA 113). Such circumstances, the Commission stated, will raise a presumption that "the applicant realistically proposes to serve the larger community rather than his specified community," (JA 113) and if not rebutted, applicant will be required to meet the technical provisions of the Commission's Rules for stations assigned to the larger community. Pursuant to the Commission's *Policy Statement*, the Broadcast Bureau, on January 7, 1966, filed a petition to enlarge issues and remand the proceeding to the Examiner for further hearing, contending that the presumption applies, since Mishawaka, with its population of 33,361 persons, is less than half the size of the contiguous larger community of South Bend, with a population of 132,445 persons, and since the proposed operation is directionalized toward South Bend with the 5 mv/m daytime contour encompassing the entire city of South Bend. By Memorandum Opinion and Order, 2 FCC 2d 938 (JA 115), released March 11, 1966, the Board found that the evidence in the existing record was not sufficient to resolve the issues being sought by the Bureau in accordance with the Commission's criteria set out in the *Suburban Community Policy*. Accordingly, the Board remanded the application to the Hearing Examiner for further hearing in order to afford Northern Indiana Broadcasters an opportunity to rebut this presumption in accordance with the considerations set forth by the Commission in its *Policy Statement*. The only part of the record pertinent to this appeal derives from this remand hearing on the *Policy* presumption. In order for NIB to establish that its proposal was in fact one for Mishawaka rather than for South Bend, it was called upon to submit evidence regarding:

- (1) the separate and distinct needs of its designated community.
- (2) how those needs are presently met by existing stations;

- (3) how unsatisfied needs will be met by the proposed station;
- (4) whether the revenues available in the suburban community are adequate to support the proposed station.³

The burden of proof with respect to each of the above additional issues was placed upon the applicant.

A petition for enlargement of intervention was filed by South Bend Tribune (WSBT), licensee of Station WSBT, on April 5, 1966, and a petition to intervene was filed by Michiana Telecasting Corporation (WNDU), licensee of Station WNDU, on April 8, 1966. By Memorandum Opinion and Order (FCC 66M-710) released May 20, 1966, the Examiner granted WSBT's and WNDU's petitions and made them parties to so much of this proceeding as involves disposition of the issues designated by the Review Board in its Memorandum Opinion and Order released March 11, 1966 (JA 115). In a second supplemental initial decision, 13 FCC 2d 620 (JA 30), released June 20, 1967, the Examiner reached a favorable resolution of the policy statement issues, and proposed a grant of NIB's application. Exceptions, accompanied by request for oral argument, were taken by WNDU, WSBT, the Bureau and NIB.

The Board, after reviewing the entire record in this proceeding including the exceptions and briefs filed with respect to each of the Examiner's decisions, and the March 12, 1968, oral arguments of counsel directed to all of the issues, adopted a 2 to 1 decision, 13 FCC 2d 546 (JA 52), released June 26, 1968, in which it concluded:

"...Northern Indiana, despite extensive opportunities to do so, has failed to demonstrate that it proposes a realistic Mishawaka proposal. Pursuant to the policy statement its application must therefore be considered to be for South Bend. However, Northern Indiana's application fails to meet the technical requirements for a South Bend station, of which both the issues and the particular facts preclude waiver, and must accordingly be denied. Further, a denial of the application as a South Bend proposal violates the 10 percent rule at night." 13 FCC 2d at 548. (JA 54).

On July 26, 1968, Northern Indiana Broadcasters, Inc., filed a petition for reconsideration and rehearing of the Board's decision, requesting the Board to either reconsider and set aside its decision, and issue a revised decision granting its applications, or, in the alternative, to reconsider and set aside its decision and remand the proceeding to the Examiner to afford NIB the opportunity to present additional evidence under the issues

³ In the event that it was concluded pursuant to the foregoing issues that the proposal will not realistically provide a local transmission service for its specified station location, a determination was also required as to whether the proposal meets the coverage requirements of a station for South Bend and whether there is a violation of the 10 percent rule at night, and, if so, whether a waiver is required.

added pursuant to the *Suburban Community Policy*. The Review Board concluded that NIB had not raised any facts which would warrant the Board's reconsiderations of its decision, and on November 14, 1968, adopted again by a 2 to 1 vote, a Memorandum Opinion and Order, 15 FCC 2d 264 (JA 97), denying NIB's petition for reconsideration and rehearing.

On January 16, 1969, NIB filed an application for review of the Review Board's Decision of June 26, denying its application and of the Board's Memorandum Opinion and Order of November 15, 1968, denying its petition for reconsideration of the Board's Decision. On January 21, 1970, the Commission with one dissenting vote adopted a Memorandum Opinion and Order, 20 FCC 2d 1113, released February 26, 1970, denying NIB's application for review without specifying reasons for the denial. Subsequently, NIB filed (1) a petition for oral argument (filed February 10, 1970), (2) a petition for reconsideration of the Commission's denial of its application (filed March 30, 1970), and (3) a petition for waiver of rules (filed May 22, 1970), all of which were opposed by WSBT, WNDU and the Broadcast Bureau. Simultaneously with the filing of its Petition for Reconsideration, NIB filed the instant 402(b) appeal from the same Commission Orders for which it sought reconsideration. On September 2, 1970, the Commission again with only a single dissenting vote adopted a Memorandum Opinion and Order, 25 FCC 2d 339 (SJA 301), denying NIB's petition for a waiver, and dismissing its petition for reconsideration and request for oral argument. The Commission noted that it had denied NIB's application for review without specifying reasons, and that Sections 1.106(b) and 1.115(g) of the rules forbid the filing of a petition for reconsideration in such a case. It found that NIB, in asking for a waiver of Sections 1.106(b) and 1.115(g) of the rules, presented no arguments warranting a waiver. The Commission nonetheless examined those arguments in NIB's reconsideration petition which the applicant said had not been previously considered, and found them to be unresponsive.

ARGUMENT

I. THE COMMISSION PROPERLY
CONCLUDED ON THE FACTS OF
RECORD THAT NIB FAILED TO
ESTABLISH THAT ITS PROPOSAL
WAS REALISTICALLY FOR SOUTH
BEND.

A. The Commission Did Not Fail
To Consider Appellant's
Record Evidence In
Determining That It Was
Insufficient To Rebut The
Presumption Of The Suburban
Community Policy.

Appellant states that the case differs from other Commission proceedings and appeals involving the *Suburban Community Policy* because the Review Board did not consider appellant's record evidence to determine whether it was sufficient to rebut the presumption that NIB intends to serve South Bend as opposed to the Mishawaka suburban community.

There is no basis for appellant's claim that the Board incorrectly evaluated, ignored or disregarded pertinent record evidence in applying the *Suburban Policy Statement*. Set forth in the Review Board's Decision released June 26, 1968 (JA 52), is a detailed and accurate summation of the facts and evidence covering approximately 20 closely typed pages of discussion upon which it bases its ultimate conclusions. The Review Board in carrying out the Commission's concern as expressed in the *Policy Statement* made a full exploration of all relevant concrete evidence of record. As this Court stated in affirming the Commission in a case involving an applicant who had successfully rebutted the presumption:⁴

"...It takes but the most cursory examination of the Review Board's Decision for this court to determine the exact basis and reasons for the findings and rulings of the Board. The Decision, as we have heretofore pointed out, amply reviews the evidence, sets forth detailed findings of fact, and in all other respects complies with the pertinent provisions of the Administrative Procedure Act. The Decision contains all findings needed to fully apprise the court of the essential basis of the Commission's decision. . . ."

* * *

⁴ *Northeast Broadcasting, Inc. v. FCC*, 130 U.S.App.D.C. 278, 288, 289, 400 F.2d 749, 759, 760 (1968).

"The Review Board first, and the Commission by and in its approval of the Board's Decision observed all procedural requirements, considered the issues, reached reasoned conclusions supported by substantial evidence and rendered reasoned judgment. It is not our function or authority to superimpose our opinion upon the legitimate proper action of an administrative agency. *Tampa Times Co. v. FCC*, 97 U.S.App.D.C. 256, 230 F.2d 224 (1956) and *Pinellas Broadcasting Co. v. FCC*, 97 U.S.App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956)."

B. NIB's Evidence, Although Possibly Supporting The Existence Of Some Generalized Needs, Failed To Establish Any Specific or Separate Needs In Mishawaka, *i.e.*, It Failed To Establish The Critical Fact That Such Needs Are Distinguishable From The Needs Of The Overall South Bend Metropolitan Area.

A detailed chronology of NIB's efforts to ascertain the separate and distinct needs of Mishawaka since the original filing of the application in April 1961 is set forth in paragraphs 10 through 18 of the Review Board's Decision. (JA 57-61) No worthwhile purpose would be served by repeating it here. Its primary deficiency in the context of rebutting the *Suburban Policy Statement* presumption was ably articulated by the Board in paragraph 9 of its Decision:

"While Northern Indiana has put great emphasis on its claim of extensive efforts to meet this issue, the fact is that it has adduced virtually no evidence responsive to the specific questions posed by the issue. It has merely compiled voluminous lists of persons and organizations which by the applicant's own admission are designed to establish nothing more than the fact, virtually always conceded at the outset in cases of this type, as the policy statement specifically notes, that Mishawaka has its own viable municipal institutions, some of which could benefit from additional radio service. While Northern Indiana's showing will be indicated in detail below, two specific and significant omissions must be noted at the outset. First, the applicant's surveys were admittedly random and exhibit only an occasional and apparently accidental relationship to such specific characteristics of the community as are noted in paragraph 6, *supra*. For example, while the record reveals the existence of substantial minority groups in the community, it is not even alleged that they have any needs; their existence once established, they are never referred to again in connection with existing needs, present service or Northern Indiana's own proposal. Second, to the extent that the surveys which the applicant made do tend to establish some generalized needs in the designated community, they totally fail to establish the crucial fact that such needs are distinguishable from the needs of the rest of the overall South Bend urban area. In at least one recent case the Commission has attached significant weight to these very same omissions. *Monroeville Broadcasting Company*, 12 FCC 2d 359, 12 R.R. 2d 946 (1968). . . ." (JA 57)

In short, the Review Board could not agree with NIB that the *Suburban Policy Statement* issues require only the very limited evidentiary showing submitted by the applicant to rebut the *Policy Statement* presumption. The emphasis in the *Suburban Policy Statement* is on "specific unsatisfied needs." In the language of the Board (Decision, para. 33):

"The burden upon an applicant to rebut the presumption that his proposed station will become a big city station is different that the one requiring an applicant to show only that his programming will meet needs and interests of the area to be served; not only must he show that those needs and interests will be served but, in addition, he must show that the needs and interests of the specified location are distinguishable from the needs and interests of the central city, and that the 'specific, unsatisfied programming needs' established, will be fulfilled by his proposal. Cf. *Monroeville Broadcasting Company*, paragraph 9, *supra*." (JA 68)

Accordingly, to rebut the presumption, not only must an applicant show that the needs and interests of his specified location are distinguishable from the needs and interests of the larger community, he must show that such separate needs are unsatisfied by existing stations, and that they will be fulfilled by his proposal.

Although the appellant conducted a survey in its specified community, it has not shown that Mishawaka has distinct unsatisfied programming needs, separate and apart from the larger community, or that its proposed programming would meet those unsatisfied needs. Appellant totally failed to make a reasonable convincing showing that Mishawaka has needs and problems different from South Bend, that those needs were substantially unfilled by existing stations, and that its proposed programming is designed to meet those unfilled needs.

It is further worthy of note that a very substantial portion of the applicant's evidence at the second remand hearing was wholly or partially contradicted by the record, which showed that the asserted generalized needs, to the extent they existed, were insubstantial as well as met by existing area services.⁵ Cf. *Boardman Broadcasting Co., Inc., et al.* 10 FCC 2d 422 (1967).

The danger envisioned by the Commission, i.e., identification with a larger metropolitan area, is especially great where, as here, the applicant proposes to locate in a "suburb" or bedroom community of a larger city and the degree of penetration (coverage) involved is substantial. During the day the 5 mv/m contour of the proposed operation would readily span all of the City of South Bend and a signal strength ranging from 22.4 to 23.7 mv/m would prevail over the South Bend business district. At night that strength would vary these from 20.35 to 21.3 mv/m (Review Board Decision, paragraph 38) (JA 70-71). In this

⁵ See paras. 21 through 28 of the Review Board Decision. (JA 62-65).

connection, it is also significant to note that the relationship existing between South Bend and Mishawaka is that of one existing between the most populous center in the same urbanized area and its satellite community. The population of Mishawaka is 33,361, and South Bend, 132,445. The two cities are in the same Congressional district (Third District). Mishawaka lies contiguous to South Bend and is part of the South Bend Urbanized Area (1960 U.S. Census population, 218,933) and the South Bend Standard Metropolitan Statistical Area (1960 U.S. Census population, 238,614). The Census Bureau determines the extent of these areas on the basis of location, community of interests, accessibility, density of population, and the fact that the components of such areas are all situated in the same "integrated social and economic system."

Additional evidence was offered by WNDU rebutting the fact that any significant differences exist between the needs and interests of South Bend and Mishawaka and establishing the homogeneity of the two communities. This evidence was contained in a letter from Donald P. Kommers, Assistant Professor of Government and International Studies at the University of Notre Dame, to Mr. Daniel E. Martin, Station Manager of WNDU.⁶ Doctor Kommers' views are based on detailed socio-political studies which he has co-directed in recent years concerning the extent of the social and economic integration of the Cities of South Bend and Mishawaka, and from a thorough investigation of documentary materials produced by the statistical collection agencies of the federal government and private organizations.

Doctor Kommers' competency to render such an opinion is clearly established by his expert qualifications, which include a Ph.D. degree in Political Science from the University of Wisconsin, received in 1962, and his association with the Department of Government of the California State College at Los Angeles, where he taught courses in American Government, Administrative Law, Constitutional Law, Interest Groups, and Public Opinion, from 1959 to 1963. In 1963, he joined the Department of Government and International Studies at the University of Notre Dame, and in that capacity has been writing and teaching courses in the field of American political behavior. Especially relevant is the fact that intermittently during the year and a half prior to rendering his opinion he had been doing a study of the South Bend Standard Metropolitan Statistical Area, as part of an effort to include the City and County of Elkhart, Indiana, in the federal government's definition of the South Bend SMSA.

⁶ WNDU Rebuttal Exhibit No. R-16. (JA 221).

Doctor Kommers' conclusion, based on his investigation, is stated below in his own words:

"A dominant impression which comes through this and other studies is that the social, political, and economic interaction between South Bend and Mishawaka is high. The proximity of the two cities renders the two communities, for all practical purposes, a single integrated economic unit. After all, we are dealing here with a relatively homogeneous social and economic community. It is of interest also to note that the Office of Statistical Standards within the United States Bureau of the Budget which defines Standard Metropolitan Areas treats both Mishawaka and South Bend as a single integrated economic community as does the Rand McNally Commercial Atlas and Guide in its definition of Basic Trading Areas. In short, there seems to be no real tangible evidence available to overcome these official designations of the nature of the two communities or of the predominant impression which emerges from my own investigation."

II. THE SUBURBAN COMMUNITY ISSUE IS NOT FRAMED IN TERMS OF WHETHER A GIVEN COMMUNITY IS ENTITLED TO A BROADCAST STATION.

The Commission has held that the *Suburban* problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions.

"The so-called 'separate community' question is not whether the suburban community is politically, geographically, economically, or culturally independent from another city. Rather, it is whether, in view of the proposal before us—with particular concern for its class, frequency, power, and coverage—the needs of the suburban community are to be considered apart from those of its nearby principal city or the urbanized area as a whole."⁷

Appellant's contention that "separate and distinct programming needs of a suburban community may be presumed from certain facts concerning the characteristics of the community" is squarely rejected by the Commission's holding in *Radio Crawfordsville*. Moreover, this principle has also been applied in a *Suburban* case⁸ where the Commission was satisfied that the record as a whole adequately established that the applicant's specified location was in fact independent of the larger adjacent city.

⁷ *Radio Crawfordsville*, 34 FCC 996, 999 (1963).

⁸ *Kittyhawk Broadcasting Corporation, et al.*, 20 FCC 2d 1011 (1969).

"However, we cannot infer from the independence of the two communities that they necessarily have separate and distinct program needs. It is incumbent upon the applicants under the *Suburban Community* issue to show such separate and distinct needs, i.e., to 'translate' the differing community characteristics into differing program needs. *Monroeville, supra*, at 363, 12 RR 2d at 951." 20 FCC 2d at 1016.

Finally, NIB made no meaningful effort to compare the demographic characteristics of Mishawaka and South Bend, or to show that these differing characteristics, if any, translate into separate and distinct program needs, as required by the *Suburban Policy Statement*. Cf. *Harrell v. FCC*, 105 U.S.App.D.C. 352, 267 F.2d 629 (1959).

CONCLUSION

For all of the above reasons, WNDU submits that the order of the Commission here appealed from must be affirmed.

Respectfully submitted,

MICHIANA TELECASTING CORPORATION

By:

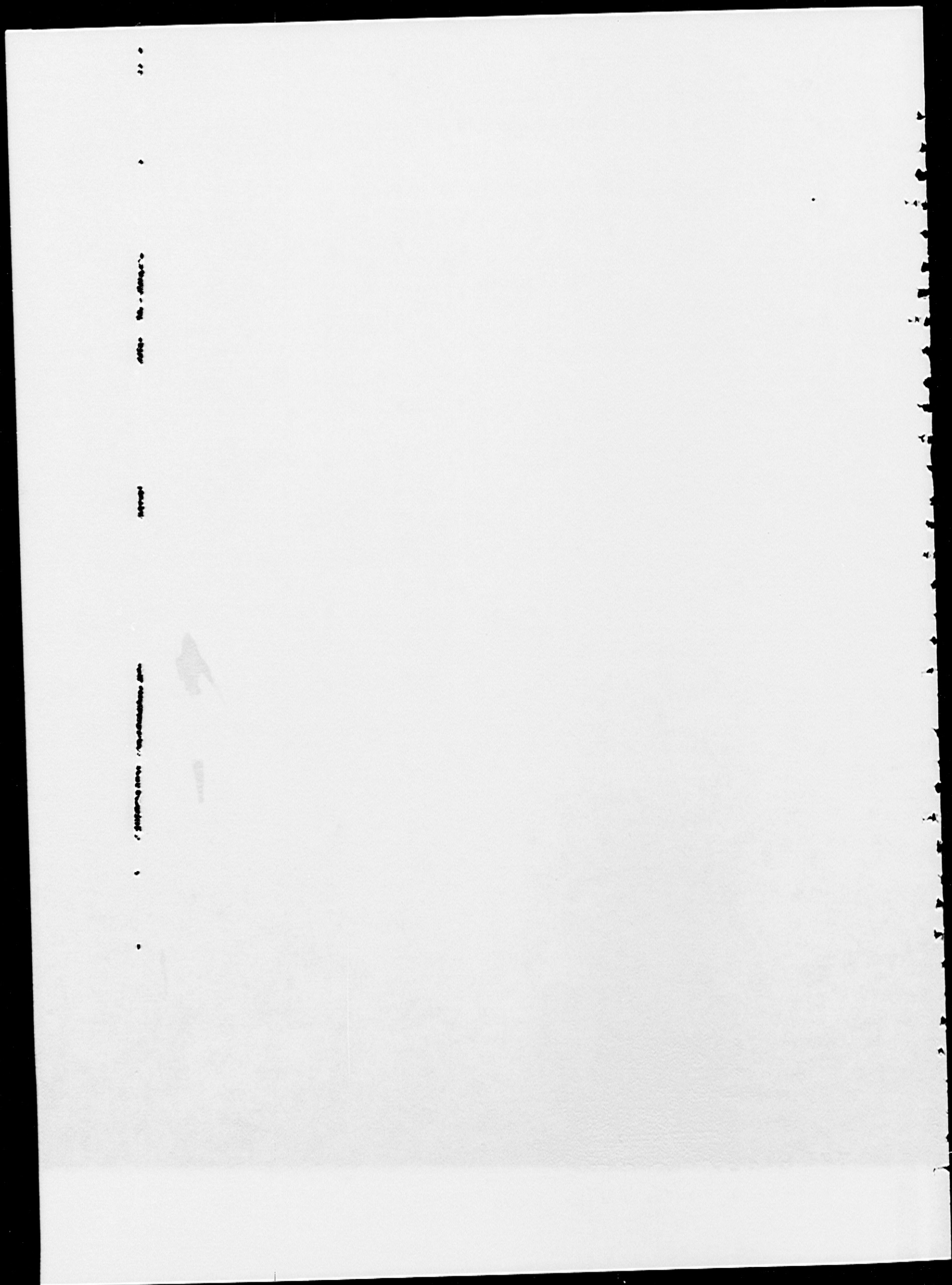
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March 10, 1971⁹

⁹ Date of filing typewritten copy under Fed. R. App. P. 30(c).



CERTIFICATE OF SERVICE

I, John J. Dempsey, hereby certify that two copies of the foregoing "Brief of Intervenor" have been sent by regular United States Mail, postage prepaid, this 22nd day of April, 1971, to each of the following:

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,071

NORTHERN INDIANA BROADCASTERS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MICHIANA TELECASTING CORPORATION,
SOUTH BEND TRIBUNE,
Intervenor.

ON APPEAL FROM A DECISION AND ORDERS OF THE
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FILED APR 24 1971

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Federal Communications Commission
Washington, D. C. 20534

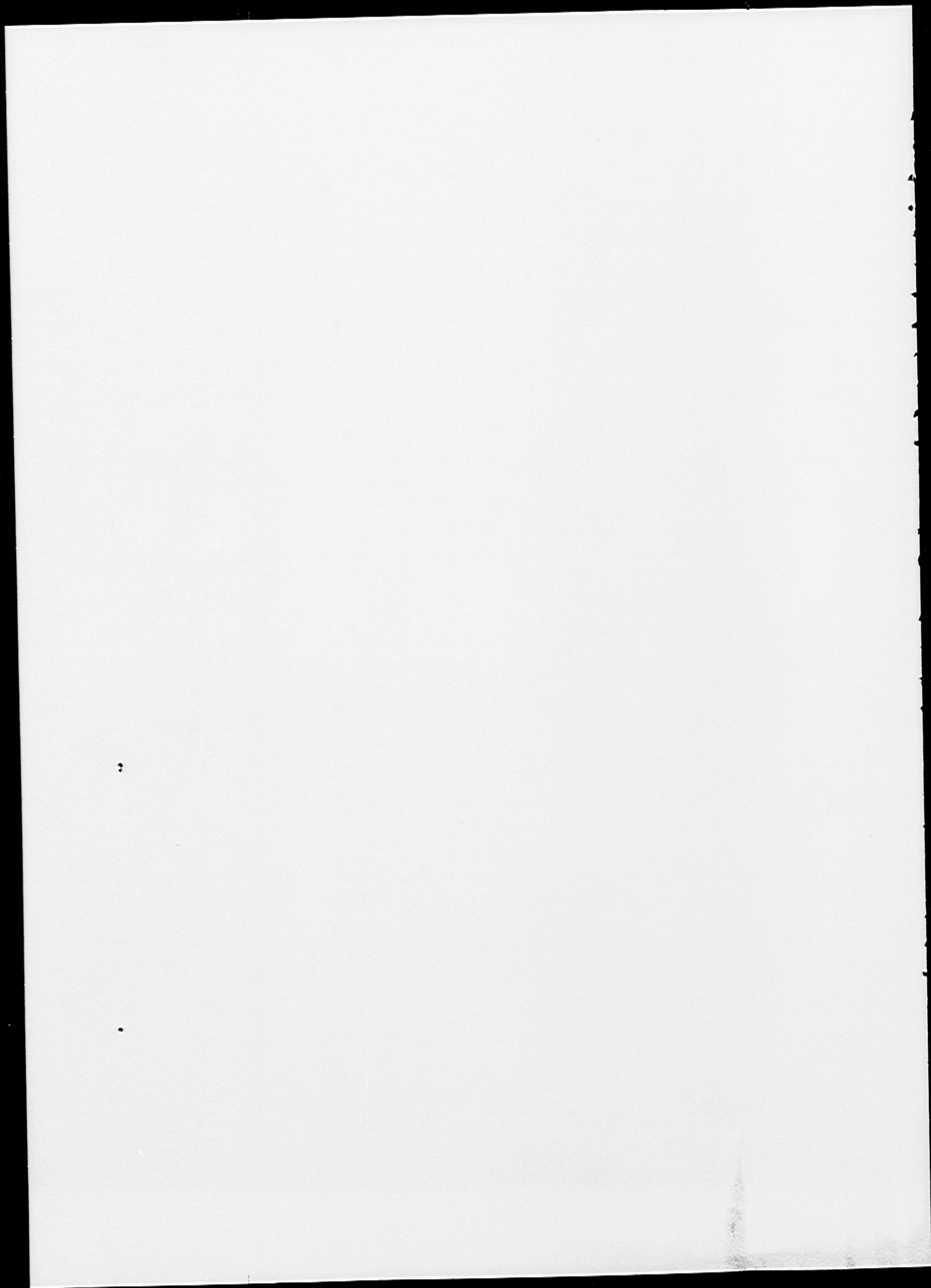


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*Section 307(b)

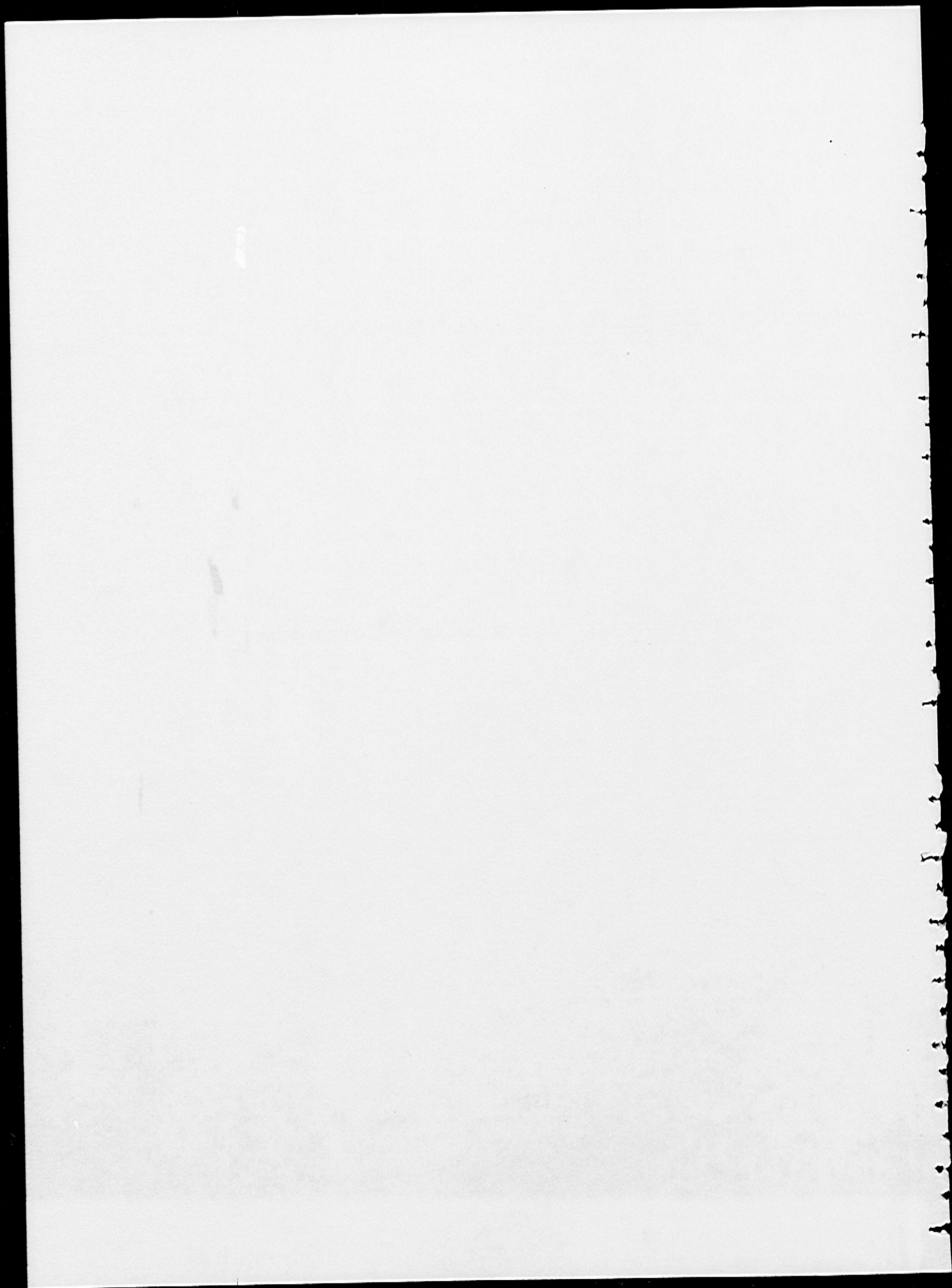
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*Cases and other authorities principally relied upon are
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Intervenors.

ON APPEAL FROM A DECISION AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

STATEMENT OF THE ISSUE PRESENTED*

Whether the Commission reasonably found that Northern Indiana's application should be denied for failure to establish that it proposed a realistic local service for Mishawaka.

* This case has not previously been before this Court.

COUNTERSTATEMENT

Appellant Northern Indiana Broadcasters, Inc. (Northern Indiana), appeals from a decision of the Commission's Review Board (13 F.C.C. 2d 546, A.52) denying its application for authority to construct a new 1 kw class III-B standard broadcast station in Mishawaka, Indiana, a suburb of South Bend, Indiana. The denial was based on Northern Indiana's failure to rebut the presumption of the Commission's Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965), reconsideration denied 2 F.C.C. 2d 866 (1966), that its Mishawaka application was simply a substandard South Bend proposal. By order of January 21, 1970 (FCC 70-86, A. 298-300), the Commission denied review. Reconsideration was denied on September 2, 1970 (25 F.C.C. 2d 339, A. 301-303).

The Commission's Policy Statement was adopted while an earlier initial decision, also dealing with the general question whether Northern Indiana's proposal would provide a realistic local service to the designated community of

Mishawaka, was pending before the Review Board.^{1/} The Policy Statement was designed to cope with the long recognized characteristic of suburban proposals that as power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. Primarily for this reason, the Commission concluded that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified location. At the same

^{1/} This earlier inquiry was ordered (3 Pike & Fischer, R.R. 2d 266, review dismissed FCC 64-1151, A. 109) to determine whether the designation of Mishawaka as Northern Indiana's principal community was simply a means of avoiding a rule (47 CFR 73.28(d)(3), known as the 10 percent rule) then in force which would, absent a Commission waiver, have precluded operation by Northern Indiana as a South Bend station because its operation would receive interference affecting more than 10 percent of the population within its normally protected service contour. The question was raised by the extent of the proposed coverage of South Bend, a statistic which was lent even greater weight by the statement of Northern Indiana's principal, William Udell, that the proposal was indeed intended to be a South Bend station. (Evidence adduced on presently irrelevant technical issues at an earlier hearing had suggested that the 10 percent rule problem would bar a grant as a South Bend station.) While the remand for hearing on the Policy Statement issues obviated final resolution of this earlier issue, much of the evidence adduced in connection therewith remained relevant, and contrary to appellant's suggestion (Br. p. 12) this evidence was accordingly considered (see 13 F.C.C. 2d 546, 549, A.55) in the decision on review.

time, the Commission noted that this presumption was rebuttable since there are many communities which adjoin a larger city which well deserve and should be afforded an opportunity to have a local transmission service. The new policy, the Commission stated, was intended: ". . . to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a substandard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community." 2 F.C.C. 2d 190, 193.

The basic change in existing procedure effected by the Policy Statement was abandonment of the normal Section 307(b) practice of presuming that every community, simply by virtue of its separate existence, had separate broadcast

needs, in favour of a requirement that suburban community applicants must prove, as a prerequisite to further consideration of their applications, that their designated communities did indeed have such needs and that the proposal was tailored to their satisfaction.^{2/}

Since Mishawaka has a population of 33,361 as compared to South Bend's population of 238,614 and since Northern Indiana's proposed 5 mv/m daytime contour would cover all of South Bend, the Policy Statement presumption arose. However, Northern Indiana argued that a remand was unnecessary since the Policy Statement established no guidelines for the requisite quantum of proof that a realistically local service was proposed in a given case and the Review Board should therefore find that the pre-existing record evidence was here sufficient. The evidence suggested as satisfactorily rebutting the Policy Statement was simply the

^{2/} Earlier ad hoc efforts to require such a showing had been rejected by this Court, essentially for lack of clarity. See Miners Broadcasting Service, Inc. v. F.C.C., 121 U.S. App. D.C. 222, 349 F.2d 199 (1965). However, then as now the Court recognized the importance of the question whether suburban proposals were legitimately local and noted the relevance of such factors as distance from the central city, "size of the suburb, its economic vitality and its independence from the central city" Ibid, footnote 6.

fact that Northern Indiana's station would be the first assignment to Mishawaka and that the presumed need for such a service should take precedence over the presumption of the Policy Statement. However, since that argument assumed the answer to the very question with which the Policy Statement was designed to cope, the Board held itself unable to entertain it. The Policy Statement, held the Board, is "clear and concise with respect to what evidence is needed to rebut the presumption that the applicant would serve the larger community" (FCC 66R-92, p. 3, A.117) and since Northern Indiana itself admitted the absence of such evidence from the record, remand was absolutely required. (Id.) Accordingly, the case was remanded "so that in addition to the usual 307(b) evidence concerning the independence of [Mishawaka] from [South Bend]" (Ibid, A.116) Northern Indiana could have a further opportunity to establish affirmatively that its proposal was in fact one to serve Mishawaka. In resolving this issue, the applicant was called upon to submit evidence "including but not necessarily limited to, the showing with respect to:"

- (1) the extent to which [Mishawaka] has been ascertained by [Northern Indiana] to have separate and distinct programming needs;
- (2) the extent to which the needs of [Mishawaka] are being met by existing . . . stations;
- (3) the extent to which Northern Indiana's program proposal will meet the specific unsatisfied needs of [Mishawaka];
- (4) the extent to which the projected sources of . . . advertising revenues within [Mishawaka] are adequate to support its proposal as compared with . . . projected revenues from all other areas. (A.118, remand p. 4). 3/

In his Second Supplemental Decision (A.30), the Examiner again ruled in favourof the applicant.

After the submission of briefs and the hearing of oral argument, the Review Board reversed the Examiner, concluding that "Northern Indiana, despite extensive opportunities to do so, has failed to demonstrate that it proposes a realistic Mishawaka proposal." (A.54). In specific reference to the threshold issue requiring an affirmative

3/ The Board's findings and conclusions under this revenue issue will not be discussed since appellant's brief does not address them and they did not figure decisively in the Board's decision.

demonstration of separate and distinct programming needs in Mishawaka, the Board reviewed the evidence submitted at the second and third hearings^{4/} and concluded that Northern Indiana "has merely compiled voluminous lists of persons and organizations which by the applicant's own admission are designed to establish nothing more than the fact, virtually always conceded at the outset in cases of this type, as the policy statement specifically notes, that Mishawaka has its own viable municipal institutions some of which could benefit from additional radio service." (A.57). In this connection the Board noted that

Northern Indiana's failure to adduce evidence of any specific or separate needs in Mishawaka may be the product of its own interpretation of the relevant issue. Despite the specific requirement of evidence indicating 'the extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs,' Northern Indiana states in its proposed findings and conclusions that the question posed by this issue is limited to a determination 'whether the needs and desires of the agencies and organizations in the suburban community are being fully and completely served by existing stations,' a question clearly not to be reached under the remand issues until it has first been determined whether such needs exist and what they are.

^{4/} "[T]he second as well as the third hearing was largely devoted to consideration of evidence relevant to the question whether Northern Indiana in reality proposes a Mishawaka station or merely seeks a substandard South Bend facility. However, since the criteria ultimately enunciated in the policy statement are now controlling, no purpose would be served by separate treatment of the relevant evidence adduced at the various hearings. Accordingly, all matters of record related to the crucial suburban community issues will be treated together at the outset." 13 F.C.C. 2d 546, 549 (A.55).

Moreover, found the Board, what evidence there was actually tended to demonstrate the affirmative absence of separate and distinct Mishawaka needs: "While Northern Indiana's program surveys are thus not even intended to answer the question posed by this inquiry, there is record evidence which does bear on the question, and it is evidence which tends to indicate the lack of any separate and distinct Mishawaka needs, and a common identity between Mishawaka and South Bend." 13 F.C.C. 2d 546, 555 (A. 61). Such evidence included the expert testimony of a government professor at Notre Dame whose study of the South Bend standard metropolitan statistical area had found a high level of "social, cultural and economic integration" between Mishawaka and South Bend, which he considered for all practical purposes to be a single integrated economic unit, consistent with their treatment as such by the Bureau of the Budget (which defines standard metropolitan statistical areas) and by The Rand McNally Commercial Atlas and Guide. This judgment, concluded the Board, was corroborated by other evidence as well.

This evidence was itemized:

As noted above, the Mishawaka Times is now defunct. Whatever reasons may be attributed to its demise, the fact remains that it is now extinct, and cannot be deemed to cloak Mishawaka with any individual identity. In addition, a number of entities have failed to maintain their separate individual Mishawaka identities. The Mishawaka Chamber of Commerce for example is no longer extant, having merged with South Bend's into the South Bend-Mishawaka area Chamber of Commerce, which represents the entire county and treats the two named communities as one for such purposes as advising new industries as to location. Similarly, the Mishawaka Red Cross has lost its local identity through merger . . . with the South Bend chapter Evidence adduced in specific connection with the issues concerning existing programming for Mishawaka reinforces these suggestions of a unity between the two communities. Station WSBT, for example, treats Mishawaka as part of South Bend in terms of its sales efforts, and each of the station's five full-time salesmen handle Mishawaka accounts, of which there are a number of all sizes. One of WSBT's Mishawaka accounts, a bicycle shop, reported that 70 percent of its business comes from South Bend, only 30 percent from Mishawaka. Similarly, in the first 8 months of 1966, station WNDU sold advertising to 33 Mishawaka advertisers out of a total of 108 solicited. In response to inquiries posed by WNDU to three Mishawaka accounts, all automobile dealers, two estimated that 30 percent of their business was attributable to Mishawaka customers, and one estimated 50 percent. Recognition of the common identity of the two communities is also implicit in a second letter from the mayor of Mishawaka introduced at the hearing as the hearing examiner's exhibit. The reason given by the mayor in this letter for supporting a Mishawaka station despite the dozens of commendatory letters in the record citing the Mishawaka service of existing South Bend stations, is simply 'competition is not only helpful, but also highly desirable.' At no time in either of her letters did the mayor cite the necessity for a Mishawaka station in terms of provision of otherwise unavailable programming.

13 F.C.C. 2d 546, 556 (A. 62).

Pursuant to the issue concerning existing programming the Board itemized the extensive present service to Mishawaka by each of the three area stations whose signals reach that community. Finally, in connection with the question of the extent to which Northern Indiana would cater to separate and unmet Mishawaka needs, the Board concluded that even ignoring both Northern Indiana's failure to establish any such needs and the evidence of service to Mishawaka from existing stations, the applicant's showing with respect to its own program service was inadequate. "At most," stated the Board, "the showing made indicates that the proposed programming would be oriented only in a general way toward Mishawaka, and also, that the programming would enhance the local coverage already rendered." 13 F.C.C. 2d 546, 561, (A.67). Moreover, the Board found that as had been the case with the evidence concerning the existence of separate and distinct Mishawaka needs, "the minimal affirmative evidence, which does indicate a limited programming orientation

toward Mishawaka is largely countered by other evidence of record:"

Thus, in regard to Northern Indiana's alleged present intent to program for Mishawaka a statement made by Udell in 1962 [see footnote 1, supra] brings into focus a question concerning Northern Indiana's real intent in the matter. That statement . . . noted by the Board in its original remand order . . . was to the effect that Northern Indiana's primary purpose in proposing a Mishawaka station was to serve South Bend.

Id.

Moreover, noted the Board, the evidence relied on under the remand issues was essentially and admittedly substantially similar to that already offered prior to addition of the Policy Statement issues and specifically found inadequate at that time to meet the more stringent evidentiary standards of the Policy Statement. 13 F.C.C. 2d 546, 562, (A. 68).

Finally the Board dealt, as it had in its remand order adding the Policy Statement issues, with the contention which is also at the heart of Northern Indiana's appeal in this Court: the assertion, with which the Board stated that it could not agree, that the general 307(b) evidence of Mishawaka's separate identity as a community is sufficient to rebut

the Policy Statement presumption:

The emphasis of [the Policy Statement] issues is upon the 'separate and distinct programing needs' and 'specific, unsatisfied needs'. The burden upon an applicant to rebut the presumption that his proposed station will become a big city station is different than the one requiring an applicant to show only that his programing will meet needs and interests of the area to be served; not only must he show that those needs and interests will be served but, in addition, he must show that the needs and interests of the specified location are distinguishable from the needs and interests of the central city, and that the 'specific, unsatisfied programing needs' established, will be fulfilled by his proposal. Cf. Monroeville Broadcasting Company, [12 FCC 2d 359, 12 R.R. 2d 946 (1968), affirmed sub nom. Miners Broadcasting Service, Inc. v. F.C.C., D.C. Cir. Case No. 21,937, decided March 20, 1969].

The Commission's refusal to review the Board's consequent denial of Northern Indiana's application was followed by the instant appeal.

ARGUMENT

THE COMMISSION COULD REASONABLY FIND THAT NORTHERN INDIANA HAD FAILED TO REBUT THE POLICY STATEMENT PRESUMPTION.

- A. The Fact That Mishawaka Has No Local Station Is Not Apposite Since It Was Found That Northern Indiana's Application Was Not In Fact A Local Proposal.

Northern Indiana's chief argument on appeal is that since Mishawaka is a community of significant size with no locally assigned station, it must be presumed to need a local broadcast outlet, a presumption which is alone sufficient to justify a grant. This analysis begs the question to which the Policy Statement issues are addressed: whether a local broadcast outlet is really what appellant would provide. The whole purpose of the Policy Statement is to permit a rational, factual procedure for answering this question, (Woodland Broadcasting Co. v. F.C.C., 134 U.S. App. D.C. 264, 114 F.2d 1160 (1969)) and in this case that procedure led to a negative answer.

In its Policy Statement the Commission indicated that in order to demonstrate that a proposal is designed to provide a realistic local transmission service for its specified community, the applicant will be expected "in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city . . . to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct needs." 2 F.C.C. 2d 190, 193.

The Commission imposed this evidentiary burden on those coming within the scope of the Policy Statement because its experience with suburban applicants had amply demonstrated "that the suburban problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions." 2 F.C.C. 2d 190, 191. It is precisely such "usual 307(b) evidence" which appellant now contends requires a finding of separate and distinct programming needs in the suburban community of Mishawaka. However, Northern Indiana's proposal, with its 5 mv/m coverage of the entire central city of South Bend is quintessentially the type of suburban application which must make the affirmative showing of separate and distinct programming needs in the suburban community which the Policy Statement demands. if the Policy Statement is to remain as "a rational and useful method of identifying potentially substandard stations." Woodland Broadcasting Co. v. F.C.C., 134 U.S. App. D.C. 264, 268, 114 F.2d 1160, 1164 (1969).

Appellant's isolated quotation from the Commission decision in Jupiter Associates, Inc., 12 F.C.C. 2d 217 (1968), affirmed 136 U.S. App. D.C. 266, 420 F.2d 108 (1969), does not support its contention that the suburban presumption can be rebutted by presumptions of needs; it merely exemplifies the obvious proposition that general data concerning the community are germane to the existence of separate and distinct programming needs. The Board in Jupiter evaluated the general data in light of the particular technical situation presented^{5/} and especially in light of the attempts of the applicant to translate the characteristics into separate and distinct needs;^{6/} it did not presume the existence of such needs from the general data.

^{5/} The proposal in Jupiter was for power of 500 watts, as opposed to Northern Indiana's 1000 watt proposal, and did not contemplate coverage of the entire central city. 12 F.C.C. 2d 217, 218. And as the Board here noted these technical factors affect the weight of rebuttal evidence in a given case. 13 F.C.C. 2d 562-3, (A. 68-69); see also Goodman Broadcasting Co., 10 F.C.C. 2d 141, 143 (1967).

^{6/} The Mayor of the designated community testified as to the need for programming geared to improving race relations among community minority groups. 12 F.C.C. 2d 217, 219. Ironically, while this case also involved a letter from Mishawaka's Mayor, her only suggestion of a need for a station was in the sense that it would provide competition for the stations whose existing service was in no way inadequate. See 13 F.C.C. 2d 546, 556, (A. 62).

The Commission has been at pains since its original remand for hearing on the Policy Statement issues to disabuse Northern Indiana of the notion that such a showing is sufficient, as was made clear in the Counterstatement (pp.5-7). In advancing this contention on appeal Northern Indiana is doing no more and no less than challenging the propriety of the Policy Statement itself, since the evidence for lack of which Northern Indiana's application failed is specifically required therein. This effort to rebut the presumption by eluding it has been rejected time and again both by the Commission and this Court. See, e.g., Woodland Broadcasting Co. v. F.C.C., 134 U.S. App. D.C. 264, 114 F.2d 1160 (1969); Cavallaro v. F.C.C., D.C. Cir. Case No. 23,480, decided November 4, 1970; and it must be rejected again.

B. The Review Board's Conclusion That Northern Indiana Had Not Rebutted The Policy Statement Presumption Was Supported by Substantial Evidence.

As an alternative to its contention that it need not rebut the Policy Statement presumption, appellant suggests that the Board failed to weigh the record evidence and thus

never decided whether or not the presumption had been rebutted. This being so, runs the argument, a remand is required. This ingenious argument finds its genesis and whole support in an isolated statement in the lengthy decision to the effect that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka." (See Br. p. 14). Since the Board erroneously held there was no evidence, suggests appellant, it obviously must have failed to weigh that evidence. It is sufficient answer to this whole argument to paraphrase the Board's holding: "the evidence adduced by Northern Indiana was insufficient to establish any specific or separate needs in Mishawaka." Far from making no findings, the Board devoted 15 pages to a detailed analysis of all the evidence, an analysis which is only briefly outlined in the above counterstatement and which appellant's brief rejects but never refutes.

It is demonstrably clear that the Policy Statement places the burden on the applicant to establish the existence of separate and distinct programming needs in the suburban community. In order to satisfy this evidentiary need, appellant submitted general data concerning the community of Mishawaka and admittedly random surveys of persons and

organizations connected with that community.^{7/} It was only after a thorough presentation and analysis of this record evidence in its opinion that the Board noted "Northern Indiana's failure to adduce evidence of any specific or separate needs in Mishawaka." 13 F.C.C. 2d 546, 555. (A. 61).

At the outset the Board observed that the general data concerning Mishawaka's local government, municipal services and other community characteristics merely constituted that formal independence of a suburb from its central city which is initially conceded to applicant's coming within the scope of the Policy Statement. Of particular significance to the Board was the failure of appellant to translate those few specific characteristics revealed in the data into specific needs. For example, the data indicated the existence of substantial minority groups in Mishawaka, but no attempt was made to ascertain the needs of those groups.

Directing its attention to the surveys made by Northern Indiana, the Board determined that "to the extent that" they "do tend to establish some generalized needs in the designated community, they totally fail to establish the crucial fact that such needs are distinguishable from

^{7/} In defense of its inadequate showing appellant has suggested throughout this proceeding that the Commission has somehow been unclear about the evidentiary obligations imposed by the Policy Statement. However, as noted above, the Board rejected this contention at the time of remand. And as this Court observed in Edwin R. Fischer v. F.C.C., 135 U.S. D.C. 134, (footnote cont'd)

the needs of the rest of the overall South Bend area." (A.57). The interviews with businessmen and organizations elicited little enthusiasm for a local station and dealt almost exclusively with advertising. (A.58-59). The interviews with educational institutions were addressed solely to coverage of sports events and were inaccurate. (A.59). The interviews with religious groups indicated only a general desire for additional coverage among some church leaders. The surveys were also found to be incomplete in that such religious groups as the St. Joseph County Council of Churches and the South Bend-Mishawaka Catholic Church Group and such civic groups as the Lions, Rotary, and Kiwanis were not even contacted. (A. 60).

While the Board could have denied the application simply for failure to rebut the presumption by establishing the existence of separate and distinct needs alone, the Board nevertheless took an affirmative look at the record evidence and observed that it tended "to indicate the lack of any separate and distinct Mishawaka needs, and a common identity between Mishawaka and South Bend." The demise of the daily newspaper, the Mishawaka Times, and the mergers of the South Bend and Mishawaka Chambers of Commerce into the South Bend-Mishawaka area Chamber of Commerce and the South Bend and

7/ (Footnote cont'd) 137-138, 417 F.2d 551, 554 (1969); "Tidewater argues that the policy statement is too vague to be understood by applicants. We reject the argument. True, the statement indicates flexibility, but it is intended to state a policy, not a formula Moreover, the remand order which preceded this denial was specific in stating areas of concern."

Mishawaka Red Cross Chapters into the St. Joseph County Chapter were considered especially relevant. Also, a letter solicited by intervenor Michiana from Donald P. Kommers, Assistant Professor of Government and International Studies at the University of Notre Dame, "concerning the extent of the social and economic integration of the cities of South Bend and Mishawaka," was considered by the Board. Based on his study of the South Bend standard metropolitan statistical area, he concluded that the geographical proximity of the two communities and their social, economic and political integration virtually rendered them a single community as indicated in the publications of the Bureau of the Budget and the Rand McNally Commercial Atlas and Guide. (A. 61).

While appellant purports to argue that the Board failed to weigh the evidence because it had erroneously concluded that there was no evidence, it is in actuality attempting to have this Court substitute its own determination as to the probative value of the evidence submitted in the course of three hearings for that of the Review Board. Since the latter's decision that Northern Indiana had not rebutted the suburban presumption is a reasonable conclusion based upon carefully detailed facts of record, this Court should not

substitute appellant's view of the facts for that of the Board. Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938); Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966); Tampa Times v. F.C.C., 97 U.S. App. D.C. 256, 230 F.2d 224 (1956); Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956).

CONCLUSION

For the foregoing reasons, the Commission's decision and orders should be affirmed.

Respectfully submitted,

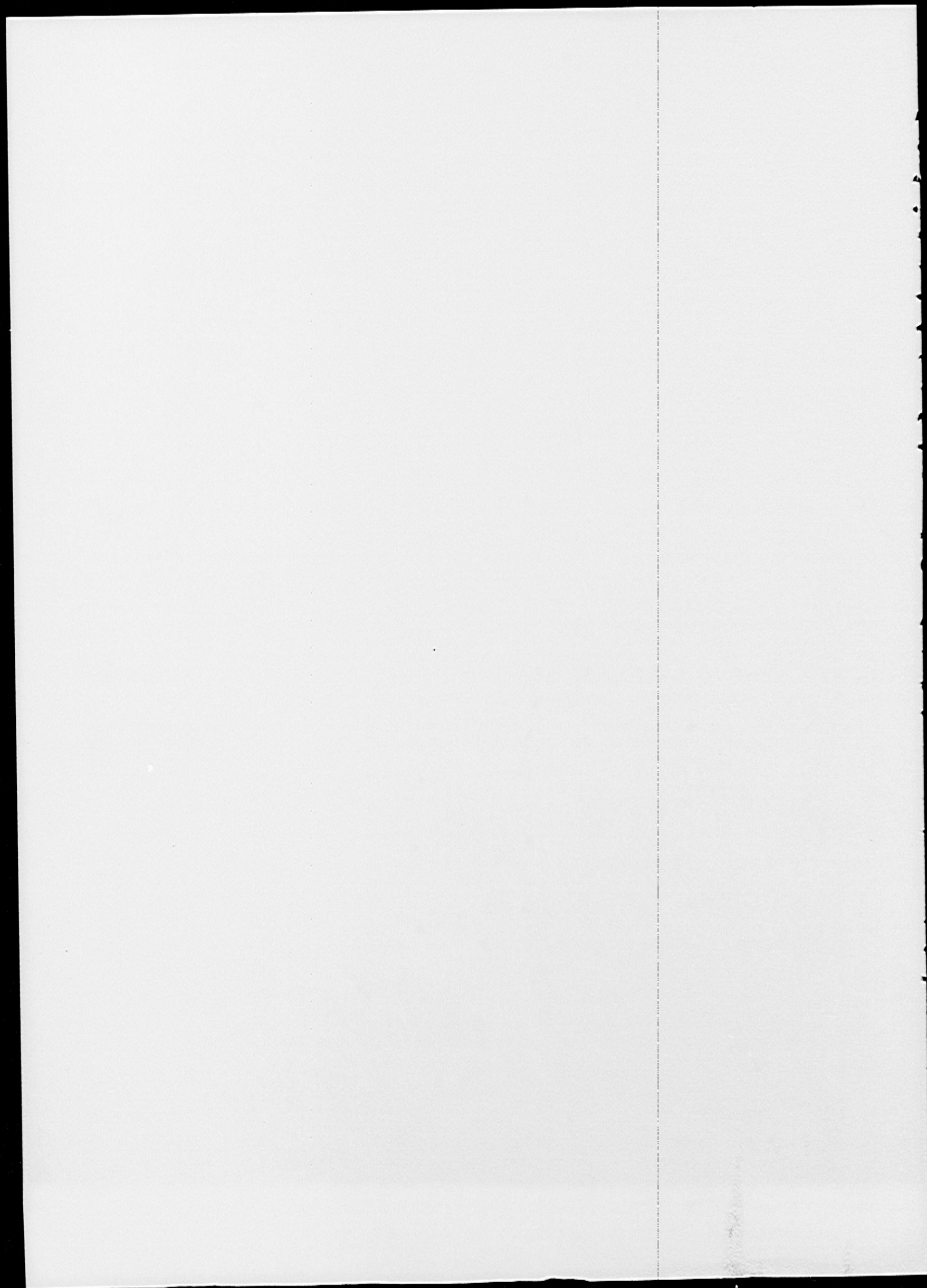
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March 10, 1971.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,071

NORTHERN INDIANA BROADCASTERS, INC.,

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

SOUTH BEND TRIBUNE,

MICHIANA TELECASTING CORPORATION,

Intervenors

ON APPEAL FROM DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
SOUTH BEND TRIBUNE

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United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT PURSUANT TO RULE 8 (d)

This case has not previously been before this Court.

REFERENCES TO RULINGS

Memorandum Opinion and Order in re Application of Northern Indiana Broadcaster's Inc., released by the Federal Communications Commission on September 4, 1970.

COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

Whether substantial evidence on the whole record supports the Commission's finding that appellant failed to meet its burden of proof under the issues designated for hearing pursuant to the Commission's Suburban Community Policy Statement.

COUNTERSTATEMENT OF THE CASE

This case has been appealed to this Court pursuant to the direct review provisions of 47 U.S.C. §402(b) and 28 U.S.C. §2342. The final order of the Federal Communications Commission ("Commission") from which Northern Indiana Broadcasters, Inc. ("Northern Indiana") seeks review is the Memorandum Opinion and Order, released September 11, 1970, denying Northern Indiana's Petition for Reconsideration of the Commission's denial of its Application for Review. Thus, the Commission has taken final action to deny the application of Northern Indiana for authority to construct a Class III-B standard broadcast station to operate in Mishawaka, Indiana, on 910 kHz with the power of 1 kw, unlimited time.

Northern Indiana's application was first filed in 1961 and was set for hearing on the issues of coverage, interference, multiple ownership and concentration of control. An Initial Decision of the Hearing Examiner favorable to Northern Indiana, opposed by the Commission's Broadcast Bureau, was released on

December 2, 1963 (JA 1-10). Newly-discovered facts, however, raised additional issues of whether the application was actually one for South Bend, Indiana, although nominally one for Mishawaka, a suburb of South Bend, and whether the record was complete on the issue of existing service to the areas proposed to be served by the applicant. The Commission's Review Board thereupon remanded the application for a new hearing on these issues. It was at this second hearing that Intervenor South Bend Tribune, licensee of WSBT, South Bend, Indiana (WSBT), first participated as a party to the proceeding in opposition to Northern Indiana's application. A Supplemental Initial Decision in favor of the applicant, opposed by WSBT and again opposed by the Commission's Broadcast Bureau, was rendered by the Hearing Examiner on October 25, 1965 (JA 11-29).

On December 27, 1965, the Commission announced its Policy Statement on 307 (b) Considerations for Standard Broadcast Facilities Involving Suburban Communities ("Suburban Community Policy Statement"), which required an automatic remand of Northern Indiana's application for another hearing on the issues articulated by the Suburban Community Policy Statement. WSBT again joined the Commission's Broadcast Bureau in opposing the application. Michiana Telecasting Corporation, licensee of station WNDU, also opposed the application as intervenor. A second Supplemental Initial Decision favorable to the applicant was released by the Hearing Examiner on June 20, 1967 (JA 30-51). The Commission's Review Board,

in an extensive 27-page Decision released on June 26, 1968, did not adopt the Initial Decision, as supplemented, of the Hearing Examiner and, on a review of the entire record, denied Northern Indiana's application because of Northern Indiana's failure to prevail on the issues designated for the Suburban Community Policy Statement hearing (JA 52-96). On a petition for review filed by Northern Indiana, the Commission, by Memorandum Opinion and Order of September 4, 1970, upheld the decision of the Review Board. Appellant now asks this Court to reverse the Commission and to remand the cause for further proceedings (JA 97-108).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE COMMISSION'S FINDING THAT APPELLANT FAILED TO MEET ITS BURDEN OF PROOF UNDER THE ISSUES DESIGNATED FOR HEARING PURSUANT TO THE COMMISSION'S SUBURBAN COMMUNITY POLICY STATEMENT.

I. The Sole Issue on Appeal Is Whether the Commission's Decision Is Reasonable and Supported by Substantial Evidence on the Whole Record.

As stated above, the instant case involves the Commission's finding, for the reasons set forth in the Review Board decision, that Northern Indiana failed to sustain its burden of proof on the issues designated for hearing pursuant to the Commission's Suburban Community Policy Statement. It is a well-established rule of judicial review of administrative agency decisions that final decisions of such agencies will be upheld if they have a

rational basis and are supported by substantial evidence in the whole record. The reviewing court will not consider the matter de novo, and the substantiality of the evidence is established if the inference drawn is a permissible one, even though the Court may consider that a contrary inference fairly could have been drawn. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). As this Court has recently stated, the reviewing court in such cases performs a "supervisory" function in its review of administrative decisions:

[This review] begins at the threshold, with enforcement of the requirement of reasonable procedure, with fair notice and opportunity to the parties to present their case. It continues into examination of the evidence and agency's findings of fact, for the Court must be satisfied that the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inferences of ultimate fact. Full allowance must be given...for the reality that agency matters typically involve a kind of expertise -- sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs. [Footnotes omitted] [Greater Boston Television Corp. v. FCC, _____ U.S. App. D.C. _____, _____ F.2d. _____ (1970)].

Appellant raises no issue as to the propriety of the Commission's procedures in this case. The sole issue for consideration by this Court, therefore, is the substantiality of the evidence and the rational support for the Commission's conclusion that the appellant failed to sustain its burden of proof as to the designated hearing issues. Again, if the Commission's decision is a rational one supported by substantial evidence, this Court,

consistent with the established tenets of judicial review of administrative agency decisions, must uphold the Commission's denial of appellant's application. This rule of judicial review is especially compelling in the case at bar since the decision of the Review Board, adopted by the Commission, was purposely of greater length and detail than normal (JA 54-55) and included an extensive review of the evidence accumulated in three hearings over a period of eight years. The 27-page decision sets out with precision the evidence in the record and the manner in which Northern Indiana failed to meet its burden of proof under the issues of this hearing.

Northern Indiana, however, wholly misstates the issue before this Court and improperly narrows the issue for review. Thus, Northern Indiana states in its brief (Brief, p. 7) that there are two issues presented by this appeal: whether certain ultimate facts may be presumed from established basic facts and, more importantly, whether the Review Board properly concluded that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka." In Northern Indiana's view (Brief, p. 7), if there is "any" evidence in the record showing separate and distinct programming needs in Mishawaka, apart from South Bend, then the Review Board's decision must be overturned. This is clearly an erroneous statement of the issue on review. For, as set forth above, the standard of review in this case is not whether there is "any" evidence in the record which is contrary to the agency's ultimate finding, but whether there is substantial evidence and a rational basis to support such a finding.

Appellant's attempt to narrow the issue in terms of "any" contrary evidence stems from a misreading of the Review Board's decision, as adopted by the Commission, and the taking out of context of a single phrase in the Review Board's 27-page decision. The statement relied upon by appellant appears in Paragraph 19 of the Review Board's decision where, in an attempt to fully explicate Northern Indiana's failure to sustain its burden of proof on the first issue in the hearing, the Review Board noted that "Northern Indiana's failure to produce evidence of any specific or separate needs in Mishawaka may be the product of its own interpretation of the relevant issue." This portion of the Review Board's decision (a portion which Northern Indiana feels compelled to quote ten separate times in its brief to this Court) does not in any way constitute the Review Board's ultimate finding that Northern Indiana had "adduced virtually no evidence responsive to the specific questions posed by the issue" relating to the existence of separate and distinct programming needs in the suburban community (JA 57). Thus, "in the Board's view, as indicated above, Northern Indiana has failed to meet its burden under [this] issue." (JA 67).

Moreover, it is equally improper for Northern Indiana to restrict review in this case to that portion of the Commission's decision relating to the single issue of whether Northern Indiana adequately ascertained separate and distinct needs for Mishawaka. On the contrary, the record clearly shows that the evidence as to all the designated issues in the hearing was considered by the

Review Board and the Commission, and, on all those issues, Northern Indiana did not prevail. Thus, the Review Board stated its conclusions as follows: "In summary, the Board finds that Northern Indiana has failed to carry its burden of proof under the Suburban Policy Statement issues, particularly issues (a) (1) and (a) (3); that therefore it has not established that its proposed station would realistically provide a local transmission service to Mishawaka. As to Northern Indiana's showing of revenue sources, issue (a) (4)...the mere showing that Mishawaka has the general economic capacity to generate some significant portion of the station's revenue is not dispositive." (JA 75).^{1/} It is these findings as they relate to all the issues of this case that form the basis of the Commission's decision to deny Northern Indiana's application.

II. There Is Substantial Evidence in the Record To Support the Commission's Findings.

In the case at bar the Commission applied its Suburban Community Policy Statement to Northern Indiana's application for a radio station in Mishawaka, Indiana. Mishawaka is a suburb of South Bend, contiguous to the larger city, and is part of the South Bend Standard Metropolitan Area. The Suburban Community

^{1/} Under issue (a) (2), the Review Board found that the intervenors in the proceeding had adequately shown that the stations of South Bend serve Mishawaka in various ways. In light of the intervenor's showing and in view of Northern Indiana's failure adequately to establish separate and distinct programming needs, the Board concluded that it could not find from Northern Indiana's showing under issue (a) (3) that its proposed programming would meet any specific, unsatisfied needs of Mishawaka. (JA 67).

Policy Statement creates a presumption, based on the Commission's experience and expertise in such matters, that applicants for broadcast facilities in a suburban community bearing a certain relationship to a major city actually intend to serve the city rather than the suburb. Northern Indiana does not question the validity of the Suburban Community Policy Statement, nor could it in good faith do so. This policy has been upheld by this Court as a rational and proper means of allocating the airways in the public interest, as the Commission has been charged by Congress to do. See, Woodland Broadcasting Co. v. FCC, 134 U.S. App. D.C. 265, 268, 414 F.2d 1160 (1969); Northeast Broadcasting Inc. v. FCC, 130 U.S. App. D. C. 278, 400 F.2d 749 (1968); Miners Broadcasting Co. v. FCC, _____ U.S. App. D.C. _____, _____ F.2d _____ (1969). In addition, this Court has upheld the Suburban Community Policy Statement against the contention that it is vague and does not give clear and sufficient notice to suburban applicants of the tests that they are required to meet. See, Fischer v. FCC, 135 U.S. App. D.C. 134, 417 F.2d 551 (1969).

In its application of the Suburban Community Policy Statement to Northern Indiana's application, the Commission designated the following issues for hearing:

(a) To determine whether the proposal of Northern Indiana Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

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In its application of the Suburban Community Policy Statement to Northern Indiana's application, the Commission designated the following issues for hearing:

(a) To determine whether the proposal of Northern Indiana Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(2) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(3) The extent to which the applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with his projected sources from all other areas.

As stated above, the Commission, in its adoption of the Review Board Decision, found that Northern Indiana had failed to carry its burden of proof under these Suburban Community Policy Statement issues. The Commission's findings have a rational basis and, as we now show, are amply supported by substantial evidence in the whole record.

With regard to issue (a) (1) -- the extent to which Northern Indiana ascertained the separate and distinct programming needs of Mishawaka -- there is substantial evidence to support the Commission's finding that Northern Indiana failed to satisfy its burden of proof. The record shows that William Udell, the owner, with his wife, of Northern Indiana Broadcasters, Inc., described a series of postcard surveys of the Mishawaka area in response to the following question asked by his counsel:

Instead of listening to the South Bend stations to determine what they are broadcasting, what steps if any did you take to ascertain what services were being rendered by other broadcast stations to business and organizations in the Mishawaka area? (JA 223; Tr 238).

The postcard survey, as Udell's counsel indicates by his question, was directed not at ascertaining separate and distinct programming needs of Mishawaka, but rather at what programming was being directed at Mishawaka audiences by South Bend stations. The survey questions reflect this intent. "Do you ever listen to any business or industry news broadcast on any radio station?" (JA 224; Tr 239); "Would you listen to a business/industry news broadcast?" (JA 224; Tr 240); "Have you ever been contacted by a reporter from the news department of a radio station?" (Ibid.) Other questions in this series were designed to elicit desires and wants rather than needs. The following question, for example, has absolutely no probative value in ascertaining the separate and distinct programming needs of Mishawaka: "If you knew that a radio station had a regular program which would broadcast free news notes and items about your organization's activities, aims, and interests, would it be of benefit to you?" (JA 226; Tr 241).

In addition to the postcard questionnaires, which Udell mailed in connection with his original filing in 1961, and a sizable proportion of which were actually directed to people who lived outside of Mishawaka (Ibid.), Udell made no further attempt after the filing of Northern Indiana's application to ascertain separate and distinct programming needs except for a discussion

with six or eight people 30 days before the 1968 hearing (JA 255; Tr 964).

Northern Indiana employed a Mrs. Davitt, a secretary by occupation and a resident of South Bend (JA 228; Tr 810), to conduct a telephone survey. Again, the questions she asked could only elicit desires from the respondents, and nothing probative with regard to separate and distinct needs was ascertained. Mrs. Davitt, for example, described the questions she directed to certain representatives of clubs and organizations as follows:

Q. First of all what did you tell them when you called up? A. That I was representing the people who were planning a new radio station to be built in Mishawaka and that I was conducting this survey and would like to ask them a very few questions. I asked whether they had ever heard their club or organization mentioned on radio, when was the last time that they had heard it mentioned, if they ever had news items of particular interest to their group, and if they had been contacted. (JA 230-231; Tr 875-76)

Even assuming, arguendo, that every answer to these questions was a negative, such responses would not indicate any separate and distinct programming needs of Mishawaka. The most they possibly could indicate is that certain groups had information of interest to their members. Typical of the responses are these (Exhibits A-2, A-3):

American Association of Retired Persons (Mr. Palmer Pese) -- have never heard their organization mentioned on radio. Any announcements they have are sent to the South Bend Tribune.

American Field Service, Mishawaka, Penn-Harris-Madison council (Frederic Craven) -- has never heard the council's activities mentioned on radio. Not many times have they had items they wished to have announced.

Mishawaka Antique Study Club (Lester Weinkauff) -- cannot remember ever hearing the club mentioned on radio. They have never been contacted but there are times when they do have announcements.

Northern Indiana Artists, Inc. (John Appleton) -- two or three times a year there are announcements on WSBT relating to art exhibits. These are carried on "Timely Topics".

Belgian American Businessman's Association (Ronald Smessaert) -- a closely knit club -- not interested in any public announcements.

Jay Cee Wives (Mrs. Gerald Lindstrom) -- very rarely do they have announcements on radio -- on these occasions they drop a card to "Timely Topics" WSBT.

General Baptist Church (Rev. Ledford Stultz) -- Rev. Stultz has never heard any mention of his church on radio. His congregation is small and he has never had any news items he felt should be on radio.

First Baptist Church (Rev. Roy Hamman) -- the First Baptist Church has a Sunday worship hour on WJVA at 10:30 a.m. The church will also have a service on Good Friday from 2:30 to 3:30.

Pleasant Valley United Church of Christ (Rev. Stephens) -- never heard his church mentioned on radio -- never had any announcements.

First Church of Nazarene (Rev. Spross) -- never had any occasion to have any announcements on radio.

As characterized by the Review Board, "Mrs. Davitt's interview reports...are in most cases of the utmost brevity, often involving nothing more than a one or two line reference to existing

service to the organizations concerned. Her business interviews deal almost exclusively with advertising." (JA 58). A problem that pervaded Mrs. Davitt's interviews was that they were many times with people who represented organizations outside of Mishawaka, and thus could not possibly lend support to Northern Indiana's assertion that it was ascertaining the separate and distinct needs of that community (JA 232-237, 244-245; Tr 877-882, 911-912). In addition, the organizations contacted by Mrs. Davitt were selected in a subjective fashion, her own inclinations and interests being the guide rather than randomness (JA 238-239; Tr 900-901):

EXAMINER: Did you go to pains to be sure to get certain organizations? A. Yes, I think I did. EXAMINER: What were those? A. Those I might have been personally interested in, those that might have been a better known organization. EXAMINER: That did not extend to the Kiwanis Club and to the Rotary Club. What I am concerned with, ma'am, is this a lost objectivity as a sampling? A. I did attempt to call Rotary and did not make a contact. Therefore I went on to the others... EXAMINER: But you were cognizant of certain organizations that you were anxious to get a response from? A. To a certain extent. EXAMINER: And I presume that was because you thought you would not get the kind of responses that you wanted, isn't that right? A. No, sir, I don't believe so...

In contacting schools Mrs. Davitt would be satisfied with the response solely of the Athletic Department spokesman (JA 229; Tr 832), and she would often accept responses from an unnamed source who happened to answer the phone when she called the organization without attempting to ascertain whether the respondent was authorized to speak on behalf of the organization (JA 240-243;

Tr 902-05). It is questionable, also, how much of Mrs. Davitt's data can be characterized as an ascertainment by Northern Indiana in the light of Udell's testimony that he is not even sure whether he read all of it, and that he made no attempt to find out which of the respondents were actually located within Mishawaka, the proposed city of license (JA 256; Tr 965).

Evidence adduced on issue (a) (2) -- the extent to which Mishawaka's needs are being met by existing stations -- likewise was substantial. Stations WSBT, an unlimited time CBS network affiliate, WJVA, a daytime only station, and WNDU, a music news station, all presented evidence of their service to satisfy Mishawaka's needs. WSBT's evidence showed that Mishawaka issues were extensively treated on its "Timely Topics" 1/2-hour weekday morning show (JA 264-292, 119-144; Tr 1040-69, R-6), on "Open Line", a daily telephone call-in program (JA 186; R-34), and on the longer "Teleconference" panel program (JA 257-258; Tr 1021-22). The WSBT news department covers Mishawaka through twelve daily calls to the Mishawaka Police Department and extensive monitoring of the activities at the Mishawaka City Hall and Fire Department. WSBT, in addition, covers all regular meetings of the Mishawaka Common Council, the School Board, and other governing bodies. Coverage of Mishawaka is augmented by the availability to WSBT of the resources of the South Bend Tribune (JA 182; R-33). WSBT participates annually in the St. Joseph County 4-H Fair, which includes many Mishawaka 4-H'ers (JA 259-263; Tr 1035-39). Several commercial and sustaining religious programs are available to Mishawaka clergy (JA 144; R-7);

public service announcements are regularly directed to the employees of Mishawaka's Ball Band plant (JA 193-295; Tr 1210-12); WSBT editorials often deal with Mishawaka problems (JA 189-194; R-40, R-41, R-42); Mishawaka's public and parochial schools participate in WSBT's school closing advisory system (JA 195-197; R-53); and WSBT maintains an active schedule of Mishawaka high school sports events (JA 198-211; R-63). WSBT's cooperation with Mishawaka school officials was commended in a letter from the Superintendent of Schools (JA 146-147; R-10). In addition, WSBT has been commended by a multitude of civic groups for its community service. These groups include the South Bend-Mishawaka Area Chamber of Commerce (JA 151; R-22), The Saint Joseph County Department of Civil Defense (JA 152-153; R-23); The Saint Joseph County AFL-CIO Council (JA 149; R-19), and The Saint Joseph County Chapter of The American National Red Cross (JA 148; R-16).

Similarly, Station WJVA introduced substantial evidence showing that it met the programming needs of Mishawaka. Daily and Sunday religious programming is available to Mishawaka churches, and the Mishawaka First Baptist Church sponsors an hour-long Sunday program. "Community Bulletin Board" and "Trading Post" are often used by Mishawaka civic and other organizations, and the station actively cooperates with Mishawaka Businessmen's Association, Jay Cee's, fire, police, and youth groups (JA 154-181; R-29).

In addition, the record shows that Station WNDU, licensed to Notre Dame University, services Mishawaka with a number of programs. About twenty per cent of the announcements on the daily "Strictly Info" program are on behalf of Mishawaka groups and

individuals (JA 212-213; R-1), and about 400 promotional announcements on behalf of United Community Services, which includes Mishawaka public service organizations, are broadcast each year (JA 214; R-4). Religious airtime is available to Mishawaka ministers on the daily "Faith for Today" program (JA 216; R-7). A substantial number of Mishawaka's basketball and football games are carried by WNDU, including both regular and tournament games (JA 217-219; R-13). Other services to Mishawaka include the personal appearances made by WNDU's Sports Director at Mishawaka functions sponsored by the Rotary Club, Little League, Jay Cee's, and city softball tournament. For seven years the Sports Director has hosted the annual Princess Mishawaka contest (JA 220; R-14). Also in evidence is a letter from Mishawaka Superintendent of Schools thanking WNDU for the help it had rendered Mishawaka schools and citing the broadcast of storm warnings, information on school closings, promotional announcements of school activities, and cultural and scientific programs utilized in the school's instructional program (JA 215; R-5). News coverage of Mishawaka by WNDU includes daily visits by a news reporter to the city's police and fire departments and to the mayor's office (JA 296-297; Tr 1468;69).

The record evidence further shows that the proposed programming of Northern Indiana, introduced in an attempt to meet issue (a) (3), fell short of that objective because it was not directed at meeting "the specific, unsatisfied programming needs of its specified station location." Indeed, the proposed programming introduced at the 1966 hearing was the same as the proposed programming appended to Northern Indiana's original Application in

1961 (JA 254; Tr 935) and could not possibly, therefore, be directed to the needs of Mishawaka alleged by Northern Indiana to have been ascertained by Mrs. Davitt in 1966. No effort was made by Northern Indiana to project its programming to reflect conditions existing in 1966. The original programming proposals of Northern Indiana are characterized by the Review Board in an earlier decision in this manner: "Most of the programming proposed is entertainment and therefore only of general interest." (FCC 64R-407).

Finally, Northern Indiana's showing of sources of revenue under issue (a) (4) consists entirely of the opinion of William Udell based on nothing more than some earlier experience as a broadcaster in two other communities (JA 246-253; Tr 925-32). The Review Board's decision characterizes this aspect of the testimony accurately:

As to Northern Indiana's showing of revenue sources, issue (a) (4), it must be noted that it is based upon Mr. Udell's opinion and experience, and upon a listing of various types of businesses which are advertising over different local media in the area; it is not based upon a survey of potential advertisers. Moreover, the mere showing that Mishawaka has the general economic capacity to generate some significant portion of the station's revenues is not dispositive. Thus, in Boardman Broadcasting Company, Inc., [10 FCC 2d 422] where a specific showing of presold advertising amounting to 69% of estimated revenues was offered, the Board said, citing the Policy Statement, that "absent a showing of the sources of the remaining...revenues, it cannot definitely be found whether Boardman with its high power and coverage, might to some extent 'tend to seek out national and regional advertisers and identify...with the entire metropolitan area...'" (JA 75).

III. No Separate and Distinct Programming Needs Can Be Presumed From the Existence of a Separate Political Entity.

The contention of Appellant that separate and distinct programming needs can be presumed from the very existence of a separate political entity like Mishawaka is completely untenable and contrary to the clear language of the Suburban Community Policy Statement and cases arising thereunder.

Initially, it must be noted that the record indicates time and time again that the suburban community of Mishawaka is virtually indistinguishable from contiguous South Bend so far as geographical and demographic characteristics are concerned. Indeed, the problem in determining whether organizations, churches and community groups were located in South Bend or one of its suburbs as reflected in the record, supra, is demonstrative of the close identity of Mishawaka and South Bend. Another example is the letter from Professor Kommers, Assistant Professor of Government at the University of Notre Dame, which states in part:

[T]he social, political, and economic interaction between South Bend and Mishawaka is high. The proximity of the two cities renders the two communities, for all practical purposes, a single integrated economic unit. After all, we are dealing here with a relatively homogenous social and economic community. It is of interest also to note that Office of Statistical Standards within the United States Bureau of the Budget which defines Standard Metropolitan Areas treated both Mishawaka and South Bend as a single integrated economic community as does Rand McNally Commercial Atlas and Guide in its definition of "basic trading areas." In short, there seems to be no real tangible evidence available to overcome these official designations of the

nature of the two communities or of the predominate impression which emerges from my own investigation. [JA 221; R-16]

In any event, Northern Indiana contends that once Mishawaka has been identified as a separate political entity, and such identification is not controverted, it has the normal institutions connected therewith, and such institutions are sufficient to raise the presumption, and consequently to allow a finding, of separate and distinct programming needs. The short answer to this contention is that this approach to the burden of proof requirements of suburban applications was specifically rejected by the Commission when it described the factors that caused it to adopt the Suburban Community Policy Statement.

[I]t soon became apparent that the suburban problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions. [Emphasis supplied] [2 F.C.C. 2d 190, 191 (1965)]

Moreover, since the promulgation of the Suburban Community Policy Statement it has been clearly understood that the approach now urged by Northern Indiana is contrary to the intent of the Commission. Thus, in a case with designated issues identical to those in the instant case, the Review Board rejected the contention that mere separate existence presumes distinct programming needs by stating that the Policy Statement is clear on the point that one seeking to overcome the Suburban presumption

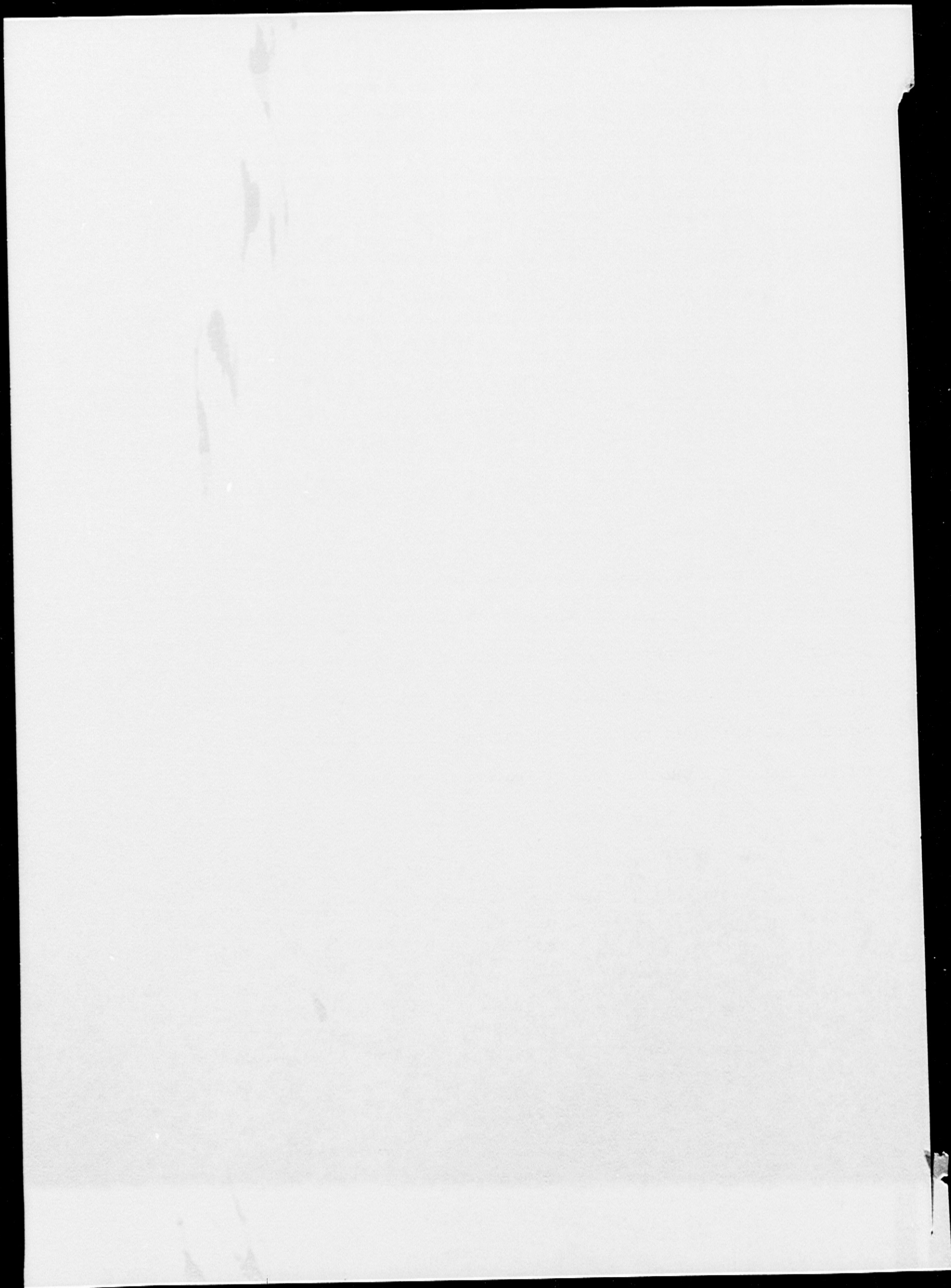
must do more than simply show that his community "has the normal indicia of a separate community." Goodman Broadcasting Co., 10 F.C.C. 2d 141, 142 (Rev. Bd. 1967). Also apposite to Northern Indiana's contention that need for a local service can be presumed from the very existence of a separately denominated community is the following language from the Commission's Review Board to the effect that such an argument is circular:

[U]nder this first sub-issue the examiner erred in relying on the tautological use of the presumption of need for a first local service as affirmative evidence under an overall issue intended to determine the very question whether a first local service is, in fact, proposed. [KWEN Broadcasting Co., 10 F.C.C. 2d 753, 758 (Rev. Bd. 1967)]

Northern Indiana cites the Review Board's decision in Jupiter Associates, Inc., 12 F.C.C. 2d 217, 12RR 2d 889 (1968), affirmed 136 U.S. App. D.C. 266 (1969), 420 F.2d 108, in support of its position. Its reliance on this case, however, is totally misplaced. For the Review Board, contrary to Northern Indiana's position, found in Jupiter that there must be clear evidence of separate and distinct programming needs rather than allowing these needs to be presumed. This position is made plain in the portion of the Review Board's decision which immediately follows the portion which Northern Indiana has quoted in its brief. Thus, after the Review Board stated that certain needs are traceable to the individual characteristics of the city, it set forth the specific evidence which the applicant had adduced to establish separate and distinct programming needs of the suburban community:

For example, in the area of law enforcement and public safety, the need was shown for a local communication's outlet to aid in crime prevention and detection; assist in curbing unfounded tension-building rumors; provide quick accurate information regarding emergencies which might develop in Elizabeth; and coordinate county-wide civil defense programs which emanate from Elizabeth. Interviews with leaders of the municipal government and various civic organizations revealed the need for informing citizens about local programs dealing with health, education, recreation, urban redevelopment and industrial relations. According to Mayor Dunn, a transmission service is needed in Elizabeth to assist in overcoming the breakdown in local communications with larger segments of the population. [footnotes omitted] [12 RR 2d at 892].

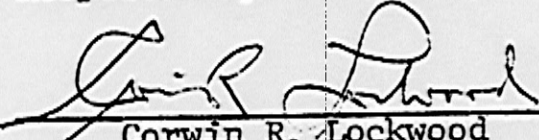
Thus, Northern Indiana's failure to adduce direct evidence of separate and distinct programming needs of Mishawaka cannot be cured by presumptive reasoning from established facts concerning the community. The record in this proceeding remains lacking in direct evidence showing the requisite separate and distinct programming needs. Accordingly, the Commission properly found that Northern Indiana had not met its burden of proof in overcoming the Suburban Policy Statement presumption.

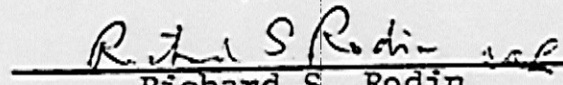


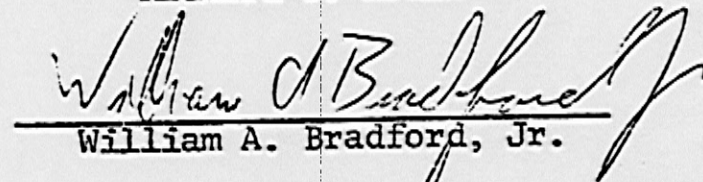
CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny the appeal of Northern Indiana and affirm the Commission's decision.

Respectfully submitted,


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March 10, 1971

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,071

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 7 1971

NORTHERN INDIANA BROADCASTERS, INC.,

Appellant

Nathan J. Paulson
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

SOUTH BEND TRIBUNE,
MICHIANA TELECASTING CORPORATION,
Intervenors.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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April 7, 1971

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REPLY BRIEF FOR APPELLANT

ARGUMENT

The arguments of the intervenors add very little to the argument of the Commission. Therefore, this reply brief will be directed primarily to the Commission's brief.

Two or three preliminary comments are appropriate before answering the arguments of the other parties.

First, Northern Indiana set forth in its brief, on pages 19 to 24, inclusive, examples of separate and distinct programming needs in Mishawaka contained in the record for the purpose of proving the error in the conclusions of the majority of the Review Board (1) that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka" (JA 61, Para. 19).^{1/} With but one exception, the parties have not attacked the accuracy of the examples set forth in Northern Indiana's brief.^{2/} The Commission and the Tribune limited their discussions almost entirely to criticizing the manner in

^{1/}The issues under the Policy Statement on 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 RR 2d 1901 (1965), are set forth in Appendix A of Northern Indiana's brief. Issue (a)(1) refers to "separate and distinct programming needs", Issue (a)(2) refers to "needs", and Issue (a)(3) refers to "specific, unsatisfied programming needs". The term "specific or separate needs" used by the majority of the Review Board does not appear either in the Policy Statement or in the issues. The terms have been used interchangeably by the majority of the Board and by all parties to this appeal.

^{2/}The single exception was the South Bend Tribune's discussion of the 1961 survey conducted by William N. Udell, Northern Indiana's president. (Tribune Br. 9-10).

which Northern Indiana's surveys were conducted and reported.

Second, not one of the parties has challenged Northern Indiana's contention that some separate and distinct programming needs in Mishawaka have been proven from the evidence as to how the existing stations have met the needs in Mishawaka. In fact, all have pointedly avoided discussing that contention.^{3/}

Third, although Northern Indiana cited but one authority in its brief^{4/}, because reliance upon authorities were not required to answer the simple, narrow questions presented on appeal, each of the other parties have cited a number of authorities. In not one of the cited decisions did the Commission conclude, as did the majority of the Board here, that the applicant had failed "to adduce evidence of any specific or separate needs" in the suburban community. And in not one of the cited decisions did the Commission conclude, as the majority did here, that the applicant had failed to meet its burden of proof under the ascertainment of separate and distinct programming needs issue, Issue (a)(1) of the Suburban Community Policy.

^{3/}Issue (a)(2) is to determine "[t]he extent to which the needs of the specified station location [Mishawaka] are being met by existing standard broadcast stations."

^{4/}Jupiter Associates, Inc., 12 FCC 2d 217, 12 RR 2d 889 (1968), affirmed 136 U.S.App.D.C. 266, 420 F 2d 108 (1969).

I.

THE PARTIES HAVE MISSTATED THE PRINCIPAL
QUESTION PRESENTED BY THIS APPEAL

The questions presented for consideration by Northern Indiana are simple, straightforward, and narrow.

The principal question is whether the record contains any evidence of programing needs in Mishawaka (the suburb) which are separate and distinct from the programing needs in South Bend (the central city). An ancillary question is whether at least some specific or separate programing needs of a suburban community may be presumed from certain facts concerning the community.

Northern Indiana wants to make it clear that it is not challenging the propriety or lawfulness of the Suburban Community Policy, a contention advanced by the Commission in its argument (FCC Br. 19). Nor is Northern Indiana contending, as argued by the Commission, that "since Mishawaka is a community of significant size with no locally assigned station, it must be presumed to need a local broadcast outlet, a presumption which is alone sufficient to justify a grant". (FCC Br. 14; Emphasis supplied).

The first portion of the Commission's argument (FCC Br. 14-17) is devoted largely to answering the questions set forth in the preceding paragraph. Because that portion of the argument provides no significant assistance in answering the

questions presented on appeal by Northern Indiana, the reply to the Commission will be directed almost entirely to the second half of its argument.

The South Bend Tribune follows another line of attack. The Tribune's principal contention is that the denial of Northern Indiana's application was based upon substantial evidence supported by findings and conclusions on each of the issues of the Suburban Community Policy. Michiana's argument is similar to that of the Tribune.

A. The Conclusion That Northern Indiana Failed To Adduce Evidence Of Any Needs Was Not An Isolated Statement

The Commission argues early in its brief that the conclusion of the majority of the Review Board, that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka," was an "isolated statement" and terms Northern Indiana's argument as "ingenious" (FCC Br. 18). The Tribune argues that Northern Indiana has relied upon a "single phrase in the Review Board's 27-page decision" which has been taken "out of context". (Tribune Br. 6).

The simple answer is that the majority used the word "any" not once, but twice; first in its Decision and later in its Memorandum Opinion and Order denying Northern Indiana's petition for reconsideration. The majority's reaffirmation of its

use of "any" was as follows:

It is not a matter of the Board requiring a greater degree of proof than the Policy Statement; it is simply that the Board was unable to find on the basis of the record evidence, that Mishawaka had any separate and distinct needs.

(JA 102, Para. 11)

The emphasis of "any" was provided by the majority.

B. The Conclusion That The Record Failed To Contain Evidence Of Any Separate And Distinct Needs In Mishawaka Led Directly To Denial Of The Application

The conclusion in paragraph 19 of the majority's Decision, that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka", was the basis for the majority's conclusion in paragraph 31, that "Northern Indiana has failed to meet its burden of proof under issue (a)(1), i.e., the ascertainment of separate and distinct programing needs of Mishawaka." (JA 61, Para. 19; JA 67, Para 31). That conclusion led to the next conclusion that Northern Indiana's application must be considered as one for South Bend rather than for Mishawaka because the presumption of the Suburban Community Policy had not been rebutted. The application then was denied for failure to satisfy certain engineering requirements for licensing as a South Bend station. (JA 75, Para. 47).

The Tribune and Michiana argue that the denial of the application was based upon substantial evidence supported by findings and conclusions on each of the issues of the Suburban

Community Policy. That argument ignores not only the conclusions in paragraph 31 of the Decision that "Northern Indiana has failed to meet its burden of proof under issue (a)(1)"(JA 67), but also the reaffirmation, in the Memorandum Opinion and Order denying the petition for reconsideration, which was as follows:

The majority of the Board then concluded that Northern Indiana had failed to meet its burden under Issues (a)(1) and (a)(3). Consequently, Northern Indiana had also failed to rebut the presumption that it "realistically proposes to serve the larger community [of South Bend] rather than [its] specified community [of Mishawaka]".

(JA 102, Para. 11).

Further, it is axiomatic that, except under most unusual circumstances which are not present here, a conclusion that the record contains no evidence cannot be based upon substantial evidence.

II.

NORTHERN INDIANA'S SHOWING THAT THE
RECORD CONTAINS EXTENSIVE EVIDENCE
OF SEPARATE AND DISTINCT PROGRAMING
NEEDS IN MISHAWAKA HAS NOT BEEN REBUTTED.

Both the Hearing Examiner and one member of the Review Board concluded that the evidence of specific, separate and distinct programing needs in Mishawaka was so extensive that the application must be considered as a bona fide application for Mishawaka and should be granted (JA 49-51, 85-96). With exactly the same facts before them, two members of the Board concluded that Northern Indiana had failed "to adduce evidence of any spe-

cific or separate needs in Mishawaka", held that the application must be considered as one for South Bend rather than for Mishawaka, and then denied the application for failure to satisfy certain engineering requirements for licensing as a South Bend station. (JA 61, 75).

How was it possible for four such experienced experts as three members of the Review Board and the Examiner to reach such diametrically opposite conclusions on so simple a question as to whether the record contains "evidence of any specific or separate needs in Mishawaka"? ^{5/}

A number of factors contributed to the diametrically opposite conclusions of the experts. First, although the term "separate and distinct programing needs" has been widely used since issuance of the Policy Statement five years ago, there never has been a concise statement as to just what constitutes a "separate and distinct programing need". ^{6/} Second was the

^{5/} If the conclusion of the majority had been that the evidence of specific or separate needs in Mishawaka was insufficient to rebut the presumption of the Suburban Community Policy, differences of opinion would be understandable. But that was not the conclusion of the majority. The word "any" was not used inadvertently by the majority, is not susceptible of more than one meaning, and, as shown above, was repeated by the majority when it denied the petition for reconsideration.

^{6/} An analogous situation exists with the term "strike application". Although the term has been widely used for a period of at least

(Continued on next page)

ancillary question presented by Northern Indiana as to whether at least some separate and distinct programing needs may be presumed from certain evidence concerning the characteristics of the suburb and its relationship to the central city. Third was the difference of opinion as to whether any significant evidence other than evidence concerning the characteristics of the community was adduced at the third hearing following the remand under the Suburban Community Policy.^{7/}

The discussion which follows will be directed primarily to the last two factors.

6/ (Continued)

25 years and has been the subject of many hearings, the Commission saw fit just a few days ago to explain in simple language what constitutes a "strike application" when it designated certain applications for hearing upon "strike application" issues. Grenco, Inc., released March 25, 1971, 36 Federal Register 6026. It seems appropriate for the Court here to direct the parties to file briefs setting forth their understanding as to what constitutes a "separate and distinct programing need" before oral argument is held. Such briefs can do no harm, will not significantly delay disposition of this case, and may make a substantial contribution to this as well as to later cases before the Commission.

7/ Evidence concerning the characteristics of the suburban community and its relationship to the central city was called the "usual 307(b) evidence" in the Policy Statement (JA 111), in the remand order of the Board (JA 116), and in the Commission's brief. (FCC Br. 15).

A. The Commission And Intervenors Have Failed To Answer The Argument That Separate And Distinct Programing Needs Were Established By The Evidence Of Service Of Existing Stations For Mishawaka

Issue (a)(2) is to determine "[t]he extent to which the needs of the specified station location [Mishawaka] are being met by existing standard broadcast stations".

It is axiomatic that any evidence received under that issue not only establishes some separate and distinct programing needs in Mishawaka but also shows the extent to which the existing stations are meeting those needs.

Northern Indiana argued as follows in its brief:

In response to the Suburban Community Policy issues, Northern Indiana also introduced into evidence the program schedules of the three South Bend standard (AM) stations for a week in February and a week in September 1966 as published in the South Bend Tribune (Northern Indiana Exhibit Nos. R-4 and R-5). In rebuttal, the two intervenors (the Tribune and Mishawaka) presented more detailed evidence concerning the program service of their respective AM stations (WSBT and WNDU) and somewhat less detailed evidence concerning the program service of the daytime only station, WJVA. Additional evidence concerning the separate and distinct programing needs in Mishawaka was developed from the intervenors' evidence. The majority of the panel failed to consider such evidence when it concluded that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka."
(NI Br. 16-17).

Northern Indiana also argued:

Before discussing the results of Mrs. Davitt's survey, it must be noted that the majority apparently proceeded upon the assumption that "separate and distinct programing needs" in the specified community [Mishawaka] cannot exist for an organization which has used in the past or is using at the present facilities of an existing broadcast station. Such an assumption does violence to the first two issues under the Suburban Community Policy, which are first, to ascertain what needs exist (Issue (a)(1) and second, to then determine the extent to which those needs are being met by existing stations (Issue (a)(2)). In other words, a need for broadcast service of a Mishawaka organization does not cease to be a need by the organization's use, at some time in the past, the facilities of an existing station....
(NI Br. 18-19).

Examples of organizations whose needs have been served in the past by just the Tribune's station (WSBT) were set forth on pages 21 through 24 of Northern Indiana's brief.

The reason for the extensive quotes from the brief in this case is to demonstrate that all parties were put on notice that this was one of the arguments being made by Northern Indiana.

The Commission makes absolutely no effort to answer Northern Indiana's argument. In fact, the Commission's argument contains no reference to the program service of existing stations.

The Tribune likewise makes no effort to show that Northern Indiana's argument is unsound. Instead, the Tribune actually reinforces the showing of separate and distinct programing needs in Mishawaka ascertained from the program service of the existing stations (NI Br. 21-24) by devoting two and a half pages of its

brief, to example after example of additional needs of Mishawaka served by the existing stations ^{8/}. (Tribune Br. 14-16).

Northern Indiana does not contend that the separate and distinct programing needs in Mishawaka established by the evidence of the manner by which the existing stations have served or are serving the needs in Mishawaka are sufficient, standing alone, to rebut the presumption of the Suburban Community Policy. However, the needs developed by such evidence are more than sufficient to prove that the majority of the Board's conclusion, that the record contains no "evidence of any specific or separate needs in Mishawaka", was erroneous.

Even though Northern Indiana has provided ample proof that the denial of its application was based upon the erroneous

^{8/} Some of the additional needs established from the Tribune's brief are those of the Mishawaka Police and Fire Departments, the coverage of "all regular meetings of the Mishawaka Common Council, the School Board, and other governing bodies", "Mishawaka problems" requiring coverage by "editorials", "the school closing advisory system", and the "active schedule of Mishawaka high school sports events", all by WSBT; the "hour-long Sunday program" of the Mishawaka First Baptist Church, the announcements by "Mishawaka civic and other organizations", and the cooperation "with Mishawaka Businessmen's Association, Jay Cee's, fire, police and youth groups" by WJVA; and the "functions sponsored by the Rotary Club, Little League, Jay Cee's, and city softball tournament" supported by WNDU, the broadcast by WNDU of "storm warnings, information on school closings, promotional announcements of school activities, and cultural and scientific programs utilized in the school's instructional program", and the daily news coverage by WNDU of the city's police and fire departments and the mayor's office. (Tribune Br. 14-16). The mere fact that some service has been provided for an organization, activity, or event does not necessarily establish that there is not an existing need for additional service.

conclusion of the majority of the Board with respect to ascertainment of separate and distinct needs in Mishawaka, Northern Indiana will answer the other arguments of the Commission and the intervenors to avoid the possibility that silence may be construed as abandonment of the points or a concession of the validity of the opposing arguments.

B. The Parties Have Given No
Meaningful Answer To The
Argument Of Presumptive
Needs Of A Community

The ancillary question presented on appeal by Northern Indiana is whether at least some separate and distinct programming needs in a suburban community may be presumed from certain characteristics of the community. (NI Br. 9-13).

The Commission's answer is, in pertinent part, as follows:

Appellant's isolated quotation from the Commission decision in Jupiter Associates, Inc., 12 F.C.C. 2d 217 (1968), affirmed 136 U. S. App. D.C. 266, 420 F. 2d 108 (1969), does not support its contention that the suburban presumption can be rebutted by presumptions of needs; it merely exemplifies the obvious proposition that general data concerning the community are germane to the existence of separate and distinct needs.

(FCC Br. 16).

That is just exactly what Northern Indiana has argued from the very beginning of this case, i.e., that certain data, both general and specific, are "germane [or relevant] to the

existence of separate and distinct needs". In other words, some separate and distinct programing needs in a suburban community may be determined (or presumed) from certain data, but not necessarily all data, concerning the characteristics of the community. However, such needs, standing alone, are insufficient to rebut the presumption of the Suburban Community Policy.^{9/}

9/ One statement of the Commission warrants comment:

The Commission has been at pains since its original remand for hearing on the Policy Statement issues to disabuse Northern Indiana of the notion that such a showing is sufficient, as was made clear in the Counterstatement (pp. 5-7).
(FCC Br. 17).

The Commission's Counterstatement (FCC Br. 5-7) misstates Northern Indiana's argument concerning the necessity for a further hearing under Suburban Community Policy issues.

Immediately after the Policy Statement was adopted, the Commission's Broadcast Bureau petitioned for a further hearing upon the Policy Statement issues. In opposing the petition, Northern Indiana argued that the record already contained extensive evidence concerning the characteristics of Mishawaka vis-a-vis South Bend from which certain separate and distinct programing needs could be presumed, and that the record also contained extensive evidence concerning the program service proposed for Mishawaka which had been submitted to meet the multiple ownership issue of the original order designating the application for hearing. Northern Indiana conceded, however, that one area of evidence was lacking which the Policy Statement appeared to require; namely, evidence concerning the program service the existing South Bend stations were rendering to meet Mishawaka needs. It also argued that such evidence really was not required in this particular case in light of the extensive evidence already in the record. In rejecting Northern Indiana's opposition and adding the Suburban Community Policy issues, the Board said that "[t]he evidence in the existing record is not

(Continued on next page)

Jupiter was not the only case in which the Commission approved the use of "demographic...evidence" to establish certain separate and distinct programming needs in a suburban community. In, Naugatuck Valley Service, Inc., 8 FCC 2d 755,777, 10 RR 2d 737, 760 (1967), affirmed sub. nom, Northeast Broadcasting, Inc., v. FCC, 130 U.S. App. D. C. 278, 400 F.2d. 130 (1968), the Review Board said as follows in its conclusions:

3. As our findings show, Naugatuck has a population of 19,511; is governed by a mayor and a board of burgesses; has its own police, fire, and water departments; its own schools, roads, and highways; and levies its own taxes. It has its own representatives in the State legislature, its own newspaper, its own churches, and its own civic organizations, its own community chest, all separate and distinct from those in Waterbury. Naugatuck also has its own industries, which industries draw on the surrounding towns, including Waterbury, for a substantial part of their labor force. In view of these characteristics of Naugatuck and based on our findings of fact concerning all of the attributes of Naugatuck as a community, it is concluded that Naugatuck is an independent community, separate and apart from Waterbury; it cannot be considered either as a residential or a "bedroom" type community, or a typical suburb of a principal city (Waterbury) under the normal usage of that word....

9/ (Continued)

sufficient to resolve the issues being sought by the Broadcast Bureau in accordance with the Commission's criteria set out in the policy statement". (Emphasis supplied). However, the Board did not hold, as argued by the Commission here, that at least some separate and distinct programming needs in a suburban community cannot be presumed from certain characteristics of the community. (JA 117).

That evidence, and the conclusions drawn therefrom, coupled with other evidence, primarily the manner in which the applicant's existing station was serving the needs of Naugatuck, was sufficient to rebut the Suburban Community Policy presumption.

In Monroeville Broadcasting Company, 12 FCC 2d 359, 365, 12 RR 2d 946, 953 (1968), affirmed sub. nom. Miners Broadcasting Co. v FCC, D. C. Cir., Case No. 21, 937 (1969) (Unreported), the Commission stressed the significance of certain characteristics of the suburban community:

Although the community of Monroeville is dependent to some degree on Pittsburgh's political, social, and economic institutions and is considered in some respects to be a satellite community, it has its own local government, police and fire departments, schools and churches, two principal shopping and business areas, and various industrial concerns.

That evidence, and the conclusions drawn, combined with other evidence and led to the conclusion that the applicant had successfully rebutted the Policy Statement presumption.

Jupiter is an "isolated" case only insofar as the use of the word "demographic" was used. In fact, almost without exception, every decision involving Suburban Community Policy issues includes extensive evidence concerning the characteristics of the suburban community vis-a-vis the larger central city.

Northern Indiana's position bears repeating. It agrees with the arguments of the Commission and the intervenors that the mere fact that the suburb is a separate municipality does

not, in and of itself, establish any significant separate and distinct programing needs. However, when additional facts are presented, for example the existence of a separate hospital in the community and the existence of an entirely separate school system, certain separate and distinct needs can be presumed from those facts.

The record contains extensive evidence of characteristics of Mishawaka, other than the fact that it is a separate municipality. (JA 4-5, 18-19, 35-37). Surely, at least one separate and distinct programing need has been established by that mass of evidence. If one has been established, others undoubtedly have been established. That is the reason a remand is required.

One additional argument of the other parties warrants comment.

The Commission cites the "demise of the daily newspaper, the Mishawaka Times, and the mergers of the South Bend and Mishawaka Chambers of Commerce into the South Bend Mishawaka Area Chamber of Commerce and the South Bend and Mishawaka Red Cross Chapters into the St. Joseph County Chapter . . . [as] especially relevant." (FCC Br. 20-21).

The significance of and weight to be given to those occurrences is open to debate. The Commission has overlooked the very first part of the first of the Suburban Community Policy

issues which is as follows:

- (a) To determine whether the proposal of Northern Indiana Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant, including, but not necessarily limited to the showing with respect to:
(NI Br., Appendix A; Emphasis supplied).

The four subissues followed.

The "demise" of Mishawaka's only daily newspaper has left the 33,000 residents of Mishawaka without their own outlet for dissemination of news. The only daily newspaper in the entire area now is the intervenor's paper, the South Bend Tribune. Unless the reason for the "demise" of the Mishawaka Times is known, that unfortunate event cannot be blamed upon the lack of separate identity of Mishawaka vis-a-vis South Bend. In fact, the loss of the only local daily outlet for dissemination of news in Mishawaka has created such a void that the separate and distinct programing needs in Mishawaka have been greatly increased and the need for the station proposed by Northern Indiana has become far greater.

Unless the scope of activities of the combined South Bend-Mishawaka Area Chamber of Commerce is known, and the record contains no such evidence, a conclusion adverse to

Northern Indiana cannot be presumed.^{10/} Further, the significance of an area Chamber of Commerce is diminished by the uncontradicted fact that Mishawaka has its own Downtown Businessmen's Association. (JA 38, Para. 23).

Even though a St. Joseph County Chapter of the Red Cross has been established, the uncontroverted evidence shows some separate Red Cross activity exists in Mishawaka. Subsequent to the merger on January 1, 1966, Mrs. Davitt interviewed "[r]epresentatives of 18 clubs and organizations in Mishawaka including the "American Red Cross." (JA 37, Para. 21).

All three parties have cited the opinions expressed in a letter of Donald P. Kommers, Assistant Professor of Government and International Studies at the University of Notre Dame (the owner and operator of intervenor Michiana's WNDU) concerning the extent and integration of the social and economic integration of the cities of South Bend and Mishawaka. (FCC Br. 21; Tribune Br. 18-19; Michiana Br. 12-13; JA 221). Because of a procedural technicality, Northern Indiana's objection and request for cross-examination and its exception were denied. (JA 82, Ruling on Northern Indiana Exception No. 1). The opinions expressed by

^{10/} If conclusions adverse to Northern Indiana can be presumed, conclusions favorable to Northern Indiana can also be presumed. What's "sauce for the goose is also sauce for the gander." This further supports Northern Indiana's contention that some needs can be presumed.

Dr. Kommers are not so overwhelming, earth shaking, and adverse as to offset extensive evidence of separate and distinct programming needs in Mishawaka. Actually, the opinions are representative of the conditions which exist in every suburb-central city relationship and have been accorded exalted and unjustified weight by the majority of the Board. (JA 61, Para. 19).

In conclusion, there never has been a pronouncement from the Commission holding that at least some separate and distinct programming needs of a suburban community cannot be presumed from certain characteristics of the community. If there had been such a pronouncement, it most certainly would have been cited by at least one of the opposing parties. The following views of dissenting Board Member Nelson correctly state the present policy and practice of the Commission:

There is nothing in the policy statement to indicate that the Commission has reverted to its policy of more than 30 years ago which required every applicant to show in every case, by means of testimony and exhibits, that a need existed for the proposed facility. During all of this time, that need has been presumed. Although the Commission has subordinated the "strong presumption of need for a first local transmission service" to the policy statement presumption, it has not eliminated the former, nor has it repudiated the rationale in which said strong presumption is based. That first local outlet presumption, which is accepted in lieu of evidence, flows from common knowledge and experience that the structure and substance of a community create needs by their mere existence.

(JA 89).

It is respectfully submitted that a remand with instructions that presumptive needs be considered is required.

C. The Commission And Intervenors Have Failed To Demonstrate That Northern Indiana's Examples Of Separate And Distinct Needs Were Not Supported By The Evidence

In addition to presumptive needs and needs ascertained from the program service of existing stations, Northern Indiana listed a number of examples of separate and distinct programming needs in Mishawaka established by the surveys and reports of Mrs. Norma Davitt.^{11/} (NI Br. 19-20; 22-23). Neither the Commission nor the intervenors have directly challenged the accuracy of those examples or argued that the examples do not prove separate and distinct programming needs in Mishawaka. Instead, the Commission and the Tribune have repeated certain comments made by the majority of the Board concerning Mrs. Davitt's work. The Tribune also cites some of Mrs. Davitt's reports to support its argument that the majority's conclusions, that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka" (JA 61, Para. 19) and that "the Board was unable

^{11/} One example of a need developed by Mrs. Davitt is contained in the following report on the contact with the Mishawaka Council of the Parent-Teachers Association. That Council no longer sends items to the South Bend stations because it has found that "they will not be broadcast". (NI Br. 23). The accuracy of that example has not been attacked.

to find on the basis of the record evidence, that Mishawaka had any separate and distinct needs." (JA 102, Para. 11), are supported by substantial evidence.

The evidence considered by the majority of the Board in reaching its conclusion that Northern Indiana failed "to adduce evidence of any separate needs in Mishawaka" is set forth in paragraphs 9 to 20, inclusive, of the Decision (JA 57, Para. 9 - JA 62, Para. 20). If those paragraphs are compared with the Examiner's findings of fact in the Second Supplemental Initial Decision (JA 35, Para. 18 - JA 23, Para 23), two things will be noted. The first are critical comments concerning Mrs. Davitt's efforts running throughout the majority's "findings". The second is that some findings of the Examiner favorable to Northern Indiana do not appear in the majority's findings. ^{12/}

^{12/} This illustrates a matter which has given Northern Indiana considerable concern. When Northern Indiana was unable to reconcile many adverse findings and conclusions of the majority of the Board with many favorable findings of the Examiner, particularly in his Second Supplemental Initial Decision, it petitioned for reconsideration. In its petition, Northern Indiana argued that it was unable to determine just what findings of fact were deleted from the three initial decisions as the result of rulings on exceptions, what findings remained which either were not subject of an exception or were the subject of an exception which was overruled, and, most importantly, just what facts and findings the majority relied upon in reaching the conclusions so adverse to Northern Indiana and so diametrically opposite to the conclusions of the third (dissenting) Board member and the Examiner. The majority's ruling on that contention is contained in the Memorandum Opinion and Order which denied the petition for reconsideration: "However, the Board's Decision does contain a complete set of findings of fact on the nonengineering issues which are the basis for the denial of the application." (JA 98, Para. 4).

At the outset, the Tribune refers to the statement of the majority of the Board that "'Mrs. Davitt's interview reports ...are in most cases of the utmost brevity, often involving nothing more than a one or two line reference to existing service to the organizations concerned. Her business interviews deal almost exclusively with advertising.'" (Tribune Br. 12-13; JA 58, Para. 12).

12/ (Continued)

As Northern Indiana reads that ruling, the majority said that the only facts it considered in arriving at its conclusion that Northern Indiana had failed "to adduce evidence of any specific or separate needs in Mishawaka" and, therefore, had failed to sustain its burden of proof under Issues (a)(1) and (a)(3), were those set forth in the majority's decision. In other words, all the findings in the three initial decisions were either deleted or ignored even though most were not the subject of a single exception.

The Commission has wide discretion in passing upon the evidence. However, that discretion may be exceeded or abused. That is the situation here.

What the majority did was to carefully cull from the record facts adverse or prejudicial to Northern Indiana and to ignore many of the facts of the Examiner which were favorable to Northern Indiana. Then the majority sprinkled its findings with critical and disparaging comments which have been seized upon by the Commission and the Tribune and quoted in their briefs. Such a practice of ignoring evidence is specifically forbidden. Saginaw Broadcasting Co., v. FCC, 68 U. S. App. D.C. 282, 96 F.2d 554 (1938), cert. denied, 305 U. S. 618, 59 S.Ct. 72 (1938); Universal Camera Corp. v. NLRB, 340 U.S. 427, 71 S.Ct. 456 (1943); Johnston Broadcasting Co., v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

This matter was not presented in Northern Indiana's brief and would not have been raised here except for the arguments contained in the briefs of the Commission and the Tribune.

There are five answers. First, it was known that Mrs. Davitt would be a witness and would have ample opportunity to expand on her reports. Second, not all of the reports were so brief; for example, the report of her contact with the president of the Mishawaka Downtwon Businessmen's Association. (JA 38, Para. 23). Third, little worthwhile information was elicited from some interviewees. Fourth, Issue (a)(4) required business contacts concerning advertising. Fifth, verbosity, not conciseness and brevity, usually is the sin. The fact that some of Mrs. Davitt's reports were brief and some of her interviews with businessmen concerned advertising does not in any way reduce the weight to be given to her surveys and reports. After all, only one, two or three instances of separate and distinct programing needs in Mishawaka need be shown to prove the error of the majority's conclusion that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka."

The next criticism of Mrs. Davitt's efforts is voiced by the Commission when it argues that Northern Indiana submitted "admittedly random surveys of persons and organizations connected with that community [Mishawaka]". (FCC Br. 18-19). A similar comment was made by the majority of the Board in paragraph 11 of the Decision. (JA 58, Para. 11).

The relationship between a random survey and the information obtained from each one of the persons interviewed

is not apparent. The majority did not hold that Northern Indiana had failed to rebut the presumption of the Suburban Community Policy because it conducted a random survey, but because it had failed "to adduce evidence of any specific or separate needs in Mishawaka".^{13/}

The Commission's next argument is that "[t]he surveys were found to be incomplete in that such religious groups as the St. Joseph County Council of Churches and the South Bend-Mishawaka Catholic Church Group and such civic groups as the Lions, Rotary, and Kiwanis were not even contacted." (FCC Br. 20).

Once again, the relationship of the failure to contact two county-wide church groups to the conclusion of the majority that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka" is not apparent. As noted above, the majority did not conclude that the presumption of the Suburban Community Policy had not been rebutted because five or any other number of groups or organizations had not been contacted or because, as stated in the Commission's brief "[t]he surveys were also found to be incomplete." (FCC Br. 20). Actually, no adverse inference or conclusion can be drawn from the failure

^{13/} On February 23, 1971, the Commission issued a Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, which specifically approves the making of "random samples" such as made by Mrs. Davitt.

to contact two county-wide church organizations when it is recognized, as noted by the majority, that "Mrs. Davitt's survey of religious leaders involved calls to 20 Mishawaka churches and to a number which were shown at the hearing not to be in Mishawaka," (JA 60, Para. 15), as well as interviews with representatives of the Mishawaka Council of United Church Women and Mishawaka Ministerial Association. (JA 37, Para.21).

The same answer can be made to the argument that Mrs. Davitt did not interview representatives of the three service clubs, Lions, Rotary and Kiwanis. The organizations she did survey are important. Most are listed in the Examiner's findings in the Second Supplemental Initial Decision which were deleted or not considered by the majority. (JA 35-37, Para. (18 - 21). Even the majority's limited findings shows that 15.2% of the "about 125 Mishawaka groups listed in the Mishawaka Enterprise's 1965-1966 Directory of Civic Organizations" were contacted by Mrs. Davitt. (JA 60, Para. 16).

It is readily apparent that what both the Commission and the Tribune have attempted to do is to divert attention from their inability to adequately counter Northern Indiana's showing of illustrative examples of separate and distinct programming needs in Mishawaka derived from many of Mrs. Davitt's surveys and reports.

III

A REMAND IS REQUIRED

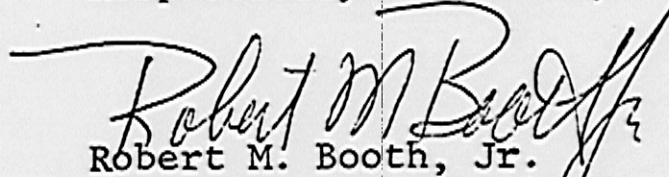
Not a single one of the many examples of separate and distinct programing needs in Mishawaka contained in Northern Indiana's brief has been directly challenged by the Commission or the intervenors. Most significantly, no party has argued that the examples do not fall within the generally accepted understanding as to what constitutes a separate and distinct programing need in the suburban community.

The question presented by this appeal is not whether the evidence adduced is sufficient to rebut the presumption of the Suburban Community Policy. To answer that question, the Court would be required to weigh the extensive evidence which most certainly is not the function of the Court. The simple and narrow question presented is whether the majority of the Review Board erred when it concluded that Northern Indiana failed "to adduce evidence of any specific or separate needs in Mishawaka" and that the record failed to show evidence "that Mishawaka had any separate and distinct needs".

CONCLUSIONS

A remand with appropriate instructions is respectfully requested.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert M. Booth, Jr.", is written over the typed name.

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